THE
MODERN LAW REVIEW

Volume 22 January 1959 No. 1

THE CONSTITUTION OF THE FIFTH FRENCH REPUBLIC

THE drafting of the new French constitution was a speedy affair compared with that of the constitution of the Fourth Republic. On June 13 a Cabinet committee consisting of the four Ministers of State and the Minister of Justice, and presided over by General de Gaulle, began work on a draft drawn up in the main by members of the *Conseil d'Etat*, on the basis of the principles laid down in the law of June 3 revising article 90 of the constitution of 1946, so as to authorise the Government to draw up a new constitution to be approved by a referendum. By the end of July the first draft had been approved by the Government and submitted to a consultative committee consisting of sixteen Deputies and ten Senators (chosen by the appropriate Commissions of their respective Assemblies) together with thirteen members chosen by the Government and considered as representative of various sections of political opinion, legal experts and representatives of professional interests. Its report, published on August 16, was then considered by the Government and an amended text submitted to the *Conseil d'Etat*. The final draft was approved by the Cabinet on September 3 and published the following day. On September 28 a referendum resulted in a majority (in metropolitan France) of 79·25 per cent. of those voting, who constituted 84·9 per cent. of the electorate, a poll higher than any held since the war.

The law of June 3 laid down a certain number of principles of constitutional reform. The Government undertook to retain universal suffrage, the separation of legislature and executive, the responsibility of the Government to Parliament, the independence of the judiciary, and to draft the constitution in such a way as to leave open the possibility of "organising the relations between the Republic and the associated peoples." On June 2, in the National Assembly, General de Gaulle had stated specifically that these undertakings meant that the future constitution would not be

presidential, that the offices of President of the Republic and Head of the Government would remain distinct.

The new constitution, therefore, provides for a system of Parliamentary government. It differs in important respects from its predecessor, and in a number of ways from the so-called "Bayeux constitution," an outline given by General de Gaulle in a speech of June 16, 1946, and assumed from then onwards to represent his views. There are some echoes of the views he then expressed; for instance, the concept of the President as arbitrator, his election by an electoral college larger than that which elected Presidents of the Third and Fourth Republics, his powers in times of crisis. But the essentials of democratic, Parliamentary government are retained. Governments are collectively responsible to Parliament; the President of the Republic is Head of the State, with functions distinct from those of the Head of the Government; and the preamble and first four articles proclaim the Republican and democratic principles contained in the constitution of 1946. This is a constitution that *can* be made to work democratically, if the will is there on the part of the statesmen responsible for applying its provisions: though there are provisions that *could* be used, or misused, for undemocratic ends. There is no doubt that General de Gaulle and his Government intend it to serve both democratic and Republican ends. Indeed, it is at first sight surprising that a Government headed by General de Gaulle, the opponent *par excellence* of the party system, should have included in the constitution a formal recognition of the existence and functions of parties (article 4). This is something quite new in the history of French Republican constitutions. Parties are to have freedom of action; they are also required to "respect the principles of national sovereignty and of democracy." [1]

THE PRESIDENT

By far the most important and controversial changes concern the role of the President of the Republic. Presidents of the Fourth Republic, like those of the Third, played, on the whole, the part played by a British constitutional monarch, though their effective power and influence were increased both by their presidency of a number of important committees and by the existence of a multi-party system, whose working resulted frequently in the absence of coherent majorities in the National Assembly. Presidents of the Fifth Republic have the same powers, as well as a number of new

[1] This provision has been widely interpreted as being designed to facilitate the banning of the Communist Party, if it should ever become necessary. Nobody attaches great importance to this, however, and not even the Communist Party assumes that any such step is contemplated either at present or in the near future.

It is only fair to add that the requirement that parties should respect the principles of democracy was not included in the Government's original draft, but was added by the Consultative Committee, the majority of whose members were Deputies and Senators. The Government retained it, however.

ones. The traditional functions of the President include presiding over meetings of the Council of Ministers, the National Defence Councils and Committees and the Supreme Council of the Judiciary; the negotiation [2] and ratification of treaties; accrediting Ambassadors; promulgating laws, including the right, before doing so, to ask Parliament to reconsider the measure; the right of pardon; and the right of appointment to a certain number of posts.[3]

In exercising these functions, the President requires the counter-signature of the Prime Minister and of other appropriate Ministers,[4] as he did under the Fourth Republic. Under the Fifth Republic, he will have at least one important additional function, namely, the right to intervene in the matter of constitutional revision, but the requirement of a counter-signature will presumably mean that he will act only with the concurrence of the Government.

But Presidents of the Fifth Republic possess, in addition to these largely formal powers, a number of new functions, which may permit them to exercise effective political power. Some are not of great significance. The President's right to "appoint" the Prime Minister (as opposed to his right only to "designate" him under the Fourth Republic, the formal appointment following his acceptance by the Assembly) represents a return to the habits of the Third Republic. It would be important only if, as has been predicted by some critics of the constitution, the Prime Minister becomes under the Fifth Republic a mouthpiece of the President, instead of being responsible in fact as well as in theory to the National Assembly.[5] In appointing the Prime Minister's

[2] There is a difference in the wording of the two constitutions, which may or may not be significant. Under the Fourth Republic the President was "kept informed of negotiations"; the 1958 constitution states that he "negotiates."

[3] The right of Presidents to nominate to "Governmental civil and military posts" is far more extensive than it was under the preceding régime. Some of these appointments will, however, be made "in the Council of Ministers," and others will, in practice, be delegated, it being left to an organic law to determine the conditions of delegation.

[4] It appears from article 19, which enumerates the articles in application of which no counter-signature will be required, that it will in future be required when the President exercises his right of pardon (article 17). The 1946 constitution stipulated that this right was to be exercised "in the Supreme Council of the Judiciary," of which the President was the Chairman. The requirement of a counter-signature applied generally (*chacun des actes . . .*). It was generally understood, however, that President Auriol's decisions regarding pardons were taken personally, though after consultation, and that he did not have a counter-signature when exercising the right of pardon (see 1946 constitution, articles 35 and 38).

[5] In normal circumstances, the Prime Minister cannot be dismissed by the President (article 8). But this would no longer hold in a state of emergency in which the President was acting under article 16 (see below, p. 6, note 10).

Where the Presidential power of appointment might have some importance is under article 56, which entitles the President to appoint three of the nine members of the Constitutional Council. This power is exercised without a counter-signature and the manner of its exercise may, therefore, be determined by precedents. The President also appoints the president of the Constitutional Council. The right of the President of the Republic to appoint all nine members of the Supreme Council of the Judiciary (article 65) will be exercised in conditions determined by an organic law, and he will, in any case, require a counter-signature.

colleagues, the President is merely ratifying the Prime Minister's choice, subject, of course, to any personal influence he may have in persuading the latter to change his mind.

There are at least four new functions, however, in the exercise of which the President could, if he wished, play a personal role, and perhaps a very important one. His right to submit to a referendum any Bill concerned with the organisation and functioning of the organs of government (*sur l'organisation des pouvoirs publics*) can be exercised only if the Government, during Parliamentary sessions, or the two Assemblies acting jointly, suggest that he should do so. But he has the right to turn down the suggestion, that is, in effect, a right of veto.[6] Similarly, his right to dissolve Parliament, at most once a year,[7] is subject to the prior obligation to consult the Prime Minister and the Presidents of the two Assemblies before doing so. But he is under no constitutional obligation to follow their advice.

In both these cases, the actual extent of the powers will be determined more by the spirit in which the constitution is applied than by the formal provisions of the text. The constitutions of the Third and Fourth Republics both contained provisions for dissolution. Yet only one occurred under the Third Republic, in 1877, and only one under the Fourth, in 1955. In both cases, the circumstances leading to the decision to dissolve were such as to discredit the institution rather than to establish precedents for its use.

The remaining two new functions are extremely important. Both undoubtedly represent the views of General de Gaulle himself regarding what ought to be the role of the Head of the State. The first, the conception of the President as "arbitrator" (*l'arbitre*), is perhaps more accurately described as an attitude of mind than a function, since the article defining Presidential "arbitration" is descriptive of the results aimed at rather than of the methods employed to achieve them, and implies the exercise of no powers not conferred by other articles of the constitution. According to article 5:

> "The President of the Republic sees that the constitution is respected, ensures by his arbitration the regular functioning of the organs of government and the continuity of the State.
>
> "He is the guardian of national independence, of territorial integrity, and of respect for agreements within the Community and for treaties."

The resemblance to the conception of the role of Head of the State as expressed in the Bayeux speech is striking. He is there described as

> "an arbitrator, standing above political contingencies and acting, in normal circumstances, as a counsellor, but, in

[6] Article 11.
[7] Article 12.

> periods of serious confusion, asking the country to express its sovereign will in elections; in the event of danger to the country it is his duty to safeguard national independence and treaties concluded by France."

The concept of an arbitrator, in the sense of one who, standing above, or outside, the political battle, is concerned primarily to maintain respect for the constitution, is not new. President Auriol came to conceive of his role in very similar terms.[8] But, for General de Gaulle, the arbitrator, though perhaps *above* the battle, is not necessarily always *outside* it, for he is expected to intervene directly at moments of difficulty; it is, for instance, as "arbitrator" that he calls for a dissolution. The tone of the present constitution, as well as some of its provisions, certainly indicate a more positive conception of the role of arbitrator than that of either President Auriol or President Coty.[9] But the form and limits of Presidential arbitration in the interests of constitutional and territorial integrity will, no doubt, depend largely, in normal times, on the relations between President and Prime Minister, and on the strength of their respective personalities.

It is the functions of the President in a national emergency, as defined by article 16, which have aroused the greatest controversy. Indeed, no article of the constitution has been so widely and so bitterly criticised. It is perhaps worth while, therefore, quoting its provisions in full.

> "In a situation in which there is an immediate and serious threat to the institutions of the Republic, the independence of the nation and the integrity of its territory or the applications of its international undertakings, and in which the regular functioning of the constitutional organs of government is interrupted, the President of the Republic, after officially consulting the Prime Minister, the Presidents of the Assemblies and the Constitutional Council, takes the measures called for by the circumstances.
>
> "He informs the nation by a message.
>
> "These measures, on which the Constitutional Council is to be consulted, must be inspired by the will to enable the organs of government to fulfil their mission with the minimum of delay.
>
> "Parliament meets as of right. The National Assembly cannot be dissolved while the emergency powers are in force."

As originally drafted, the article excluded the phrase "in which the regular functioning of the constitutional organs of government is interrupted," the obligation on the President to consult the Constitutional Council, specifically with regard to the existence of

[8] On this, see the writer's article on "The French Presidency," *Political Quarterly*, April–June, 1954.

[9] President Coty did, however, undoubtedly, exercise considerable influence during the crisis of May, 1958, particularly by his announcement that he would feel obliged to resign if it proved impossible for General de Gaulle to form a Government.

an emergency, the *right* of Parliament to meet, as opposed to its convocation, circumstances permitting, and the provision that it cannot be dissolved during the emergency. The Consultative Committee on the constitution was of the opinion that the safeguards against misuse of these powers were inadequate. General de Gaulle explained the circumstances in which he envisaged that the powers would be used. He was thinking of a grave national emergency, such as 1940, or say, a breakdown of Government owing to an atomic war. The Government amended the article to include the above-mentioned provisions, but refused to accept an additional recommendation of the Committee that the Constitutional Council's opinion regarding the interruption of "the regular functioning of the constitutional organs of government" should be binding on the President.

The misgivings of the critics of the article were not removed, however, for the essential objection remained. The President is, in the last resort, sole judge both of the circumstances in which recourse to emergency powers is justified and of the measures to be taken to deal with it.

How far the additional provisions would constitute effective safeguards against misuse of emergency powers is, of course, a matter of conjecture. It was pointed out that Parliament did meet in 1940, and that it did nothing to prevent the assumption of dictatorial powers by Marshal Pétain. On the contrary, Parliament voted them. One of the major criticisms was that, though General de Gaulle might himself be trusted not to abuse the powers, it was bad constitution-making to include in a constitution provisions "tailor-made" for one man. Professor Duverger wrote, for instance, on the Bayeux conception of the role of Head of State, a criticism that would seem equally applicable to the President's powers under article 16, and which certainly represented the views of many of its critics:

> "Either the man who wields this arbitrary power will be strong, energetic and dynamic, in which case he will refuse to stick to his role of intermittent *deus ex machina*. Or else, he will be weak, nondescript, without prestige, in which case he will not be able to act when the need for his arbitration arises. General de Gaulle will have to resign himself to the fact that you cannot institutionalise General de Gaulle. Of all roles, that of Cincinnatus is the most rarely adhered to in history; and a man with the temperament of Cincinnatus will never follow the long *cursus honorum* that leads to the position of Head of the State. Exceptions are by definition exceptional." [10]

[10] *Demain la République* (Paris, Julliard, 1958), pp. 42–43. Article 16 would seem to afford unlimited scope for legal argument regarding the precise limits (if any) to the President's powers, in an emergency. Parliament meets "as of right." But would its failure to meet be regarded as rendering the application of the article unconstitutional? And, assuming that the emergency is such that it is possible for Parliament to meet, what are its functions? If

Two further provisions regarding the office of President were criticised, though mainly because, if article 16 were applied, the President's political neutrality would inevitably be suspended. The first is the provision that the President can be held responsible for his acts in office only in cases of high treason (article 68); and the second is that concerning the Presidential electoral college (article 6). This includes, along with Deputies and Senators (who elected Presidents under the two preceding régimes) Councillors of *départements*, Mayors of *communes* and additional Councillors or delegates for the larger *communes*. Representatives of Overseas Territories and member States of the Community are also entitled to vote. The inclusion of the last-mentioned category of electors is explained by the President's position as President of the Community.[11]

There are, therefore, some 75,000 metropolitan electors, of whom about one half are Mayors or Councillors of small villages of under 2,000 inhabitants.[12] Left-wing parties object to this system on the ground that it will inevitably result in the election of conservative Presidents. This was also the general rule under the two preceding régimes (with the significant exception of President Auriol who was elected during the left-wing "honeymoon" following the war). It is a point that would have had relatively little importance, if Presidents of the Fifth Republic had been accorded powers no greater than those of their predecessors, or only powers which created no fear of their abandoning their traditional political neutrality.[13]

the President were to dismiss a Prime Minister (which he cannot constitutionally do in normal circumstances), is he expected to appoint a successor acceptable to the Assembly? What precise weight is to be attached to the Constitutional Council's advice? And what happens if it is physically unable to meet?

[11] Under article 80, the President of the Republic is also President of the Community. An organic law determines the electorate in the case of Overseas Territories (*i.e.*, those retaining their Fourth-Republic status); in the case of member States, the matter is determined by agreements between the Republic and member States of the Community.

[12] The original draft of the constitution left the composition of the electoral college to be determined by an organic law. The Consultative Committee's draft included detailed provisions, in which the over-representation of small rural communities was even more marked than in the final text. The Government modified these provisions in response to criticisms. The disparity between rural and urban representation is still marked, however. Paris will have one representative per 3,000 of the population; villages of under 1,000 inhabitants will have an average of one per 350, since all are entitled to one representative. The Committee's proposals had left Paris with one representative per 33,000.

[13] The remaining provisions regarding the Presidency present only slight changes from those of the 1946 constitution. The President is elected, like his predecessors, for seven years. It is not stated whether he is re-eligible. (Presidents of the Fourth Republic could present themselves for a second, but not a third, term.) There is no proviso regarding Presidential qualifications, the sole prohibition under the Fourth Republic (membership of a former reigning family of France) having been dropped. It is not even stated that he must be of full age, or a Frenchman. Election is by two ballots, unless a candidate obtains a half plus one of the votes at the first. A simple majority

Relations between the Government and the Assembly

The position of the Government is considerably strengthened *vis-à-vis* the Assembly. The Government is to control the Parliamentary timetable [14]; Government Bills are to be debated on the basis of the Government's text and not, as was normally the case under the preceding régimes, on the amended text as presented by the reporter of the relevant Parliamentary Commission [15]; the Government is entitled to proceed by decree in all fields except those specifically reserved by the constitution for legislation by Parliament [16]; and even in the field reserved to Parliament, the Government may obtain the consent of Parliament to legislate by decree for a limited period [17]; the right to propose measures involving increased expenditure or decreased revenue is specifically withdrawn from Parliament [18]; and legislative procedure is changed in a number of ways intended to encourage Governmental stability.[19]

Henceforth, a Government can be compelled to resign in only three ways: first, if defeated by a simple majority on a request for the Assembly's approval of its programme or its general policy; second, on a Bill or part of a Bill which the Government has made an issue of confidence; and third, on a motion of censure on the Government's general policy, signed by at least a tenth of the Deputies of the Assembly. In the last two cases, an absolute majority is required to defeat the Government (that is, a half plus one of the members of the Assembly must cast their votes against the Government). In the case of a vote of confidence on a Bill, the Government is assumed to have been accorded the Assembly's confidence, without a vote being taken, unless a motion of censure is

only is required at the second ballot. Under the law of November 23, 1953, the President of the Fourth Republic could be elected only by an absolute majority (using the term in the sense just described). President Coty was elected at the thirteenth ballot.

Presidents of the Fifth Republic are entitled to address messages to both Assemblies, without the requirement of a counter-signature. Under the Fourth Republic, messages must be addressed only to the National Assembly and did require a counter-signature. President Coty's message of May 29, 1958, was, however, read in both Assemblies.

14 Article 48.

15 Article 42.

16 Article 37.

17 Article 38. Under article 13 of the 1946 constitution delegated legislation was unconstitutional, but this provision was got round by a number of devices —by the grant of special powers, for instance, and by voting outline-laws (*lois-cadre*) whose provisions were completed by decrees.

18 Article 40.

19 See below, pp. 13–14, for a description of changes in legislative procedure. The withdrawal of the right of Deputies to propose measures involving an increase in expenditure or a reduction in revenue (unless the measures also included provisions for making good the loss to the revenue) was achieved in theory by the *loi des maxima* from 1949 onwards. The unqualified withdrawal of the right was voted by the Assembly as part of the proposed constitutional revision that was in process of being voted when M. Pflimlin's Government resigned in May, 1958. The revision had included changes in legislative procedure along the lines adopted by article 49 of the new constitution.

put forward within 24 hours; in both the second and third cases, therefore, the vote takes place only on a motion of censure.[20]

Whether these provisions, together with the possibility of dissolution,[21] are likely, in fact, to encourage Governmental stability is a question that has been hotly debated. And even if they do there are other new factors that might work in the opposite direction. The constitution deals only with issues on which the Government *is obliged* to resign. But experience has shown that most French Governments resign, not because their position is constitutionally untenable, but because it is politically untenable. Of the twenty governments of the Fourth Republic (preceding that headed by General de Gaulle) only five were defeated by an absolute or "constitutional" majority, that is, in the conditions in which the Government's resignation was obligatory. Of the rest, seven were defeated by a simple majority, or on a vote which had not been made an issue of confidence, and eight resigned without having been defeated. There are also some new political factors, whose importance is as yet only a matter of conjecture; the use that Parliament will make of its power to control finance, for instance[22]; the relations that will exist between President and Prime Minister, and the effect that they may have on the latter's position in the Assembly. If, as has been suggested in some quarters, the Prime Minister is merely the mouthpiece of the President, then his policy may be different from that of the majority of the Assembly. If, as has been argued alternatively,[23] there is conflict between Prime Minister and President, then there is the possibility of two conflicts where there was only one under the Fourth Republic—between President and Prime Minister and between Government and Assembly. It is possible to imagine a third, namely a conflict between Government and Assembly, in which the President's intervention, say, to order a dissolution, would be, in fact, on the side of the Assembly.

Here again, much will depend on the President's interpretation of his role and on the character of the man who will succeed General de Gaulle as President—if we can also assume that the constitution will survive for that length of time! The President *could* use his powers to strengthen the hands of a Prime Minister against the Assembly, without necessarily agreeing with his policy, but acting merely in his role of "arbitrator," in the interest of stable government. A weak President might well act as a mouthpiece of the Prime Minister, or, more probably, fail to act at all. As more than one critic has pointed out, the predominance in the Presidential electoral college of the small-town

[20] Articles 49 and 50.
[21] See below, p. 12.
[22] See below, p. 14.
[23] See for instance, Prélot, *Pour comprendre la nouvelle constitution* (Editions du Centurion, Paris, 1958), who supports the first thesis and Aron, *Propos d'un conservateur* (*Le Monde*, 8.8.58), who supports the second.

notability is more likely to result in the election of the weak, conventionally conservative nonentities who tended to fill the office under the Third Republic than of strong personalities like General de Gaulle.

The position of the Prime Minister is rendered easier in one way, though it is not necessarily strengthened, if the experience of the Third Republic is anything to go by. He is no longer required to go through the ordeal of the "investiture." He is appointed by the President and faces the Assembly for the first time with a fully constituted Government, a collective entity, seated on the Government benches with him. A "designated" Prime Minister, under the Fourth Republic, faced the Assembly alone, his colleagues, most of whose names were already known, waiting in the wings, so to speak, until their leader should have passed his oral examination, that is, until he should have been accepted as Prime Minister by the Assembly. The solitary figure, facing a barrage of Parliamentary interrogation, resembled too often a heretic facing the Inquisition rather than the responsible head of a modern Government expounding his programme.

The Assembly will, however, be able to refuse its confidence to a newly constituted Government, without the need to muster an absolute majority. The first paragraph of article 49 (*Le Premier Ministre . . . engage devant l'Assemblée Nationale la responsabilité du Gouvernement sur son programme . . .*) is widely interpreted as heralding a return to the practice of the Third Republic, when Prime Ministers began their period of office by asking for the confidence of the Chamber, after a general debate on the composition of their Government and their programme.

One constitutional innovation is likely to have far-reaching consequences on the relations between Governments and Parliament if it survives for any length of time. This is the new rule of "incompatibility" between the functions of Minister and Deputy.[24] This provision reflects General de Gaulle's long-standing and well-known dislike of the working of the party system in France. But he has found some rather surprising supporters, in particular, in the Socialist Party.[25]

The measure is intended to achieve two things; first, to remove from would-be office holders the temptation to overturn Governments in the hope of obtaining office in the next; and second, to free Ministers from party pressure. It is often assumed that its purpose is also to encourage Prime Ministers to choose some of their Ministers from outside Parliament. It can be argued that the

[24] Article 23. The incompatibility rule also affects holders of professional and public office in conditions laid down in an organic law (see Ordinance of October 21, 1958, J. O. October 25, 1958). But it is the incompatibility of the offices of Minister and Deputy that has aroused most criticism.

[25] The majority of the executive of the Socialist Party was in favour of the rule.

"incompatibility" is artificial. A Deputy cannot merely "shed" his political views on becoming a Minister; he will be dependent on the Assembly in order to carry out his policy and, the career of a Minister being more precarious than that of a Deputy, he would be ill-advised to forget his politics.[26] But however unreal the concept, it could have a number of real and undesirable effects. Fears have been expressed that it may result in the "politicisation" of the higher civil service. Whether or not this happens, if civil servants are regularly appointed to some Ministerial posts, the result may be a twofold weakening of the system; a weakening of the higher ranks of the administration (of which France is justly proud) and also of the quality of Governments. For nothing in French experience justifies the view that good civil servants make particularly good Ministers[27]; and, on the other hand, the financial and political hazards of office may deter able Deputies from seeking it. For when a Government is defeated, the Minister who was, up to his appointment, a Deputy, finds himself out of office, out of Parliament, and probably out of pocket, for the remainder of that Parliament, unless, of course, the Prime Minister asks for, and the President agrees to, or himself decides on, a dissolution.[28]

In the longer run, "incompatibility" could endanger the working of Parliamentary government itself. The National Assembly has been described as "the house without windows" because of the tendency of Deputies to develop a life of their own, insulated, as it were, from the realities of public opinion. If to this lack of contact between *le pays légal* and *le pays réel* there is added a lack of contact between Ministers and the Deputies on whose support they rely for their continued existence, then the already inadequate co-operation between executive and legislature in France will be still further impaired. The divorce between Ministers and Deputies is likely to throw the latter back on the electors, a tendency that the electoral system revived under the

[26] The rules governing the replacement of Deputies who become Ministers have been carefully drawn up so as to prevent the Minister who is no longer in office from losing his seat to his substitute at the following election. A candidate must specify on his ballot paper the name of the contingent substitute, who will replace him in the event of his death or his assumption of Ministerial office. Replacements of Deputies for most other reasons are by by-elections. The substitute Deputy will have all the rights of an ordinary Deputy, except that of standing as a candidate in the same constituency at the next election (see Ordinance of October 24, 1958, J. O. October 25, 1958).

[27] Under neither of the preceding régimes were Ministers obliged to be members of Parliament and non-Parliamentary "technicians" have been included in Governments from time to time.

[28] Anyone accepting Ministerial office gives up his seat for the remainder of the life of that Parliament. He receives his Ministerial salary for a maximum period of six months if he ceases to be a Minister. A Minister might, of course, be included in subsequent Governments during the same Parliament, but financial incentives to office are, surely, as deleterious to a Minister's independence of judgment as party pressure, which is, after all, eventually sanctioned by the electorate!

Fifth Republic has often been criticised for encouraging.[29] The result might be an increasing incoherence of parties, leading to increased Governmental instability.

Nor can it be assumed, as many supporters of the constitution do assume, that dissolution, or the threat of dissolution, will prevent Deputies from behaving irresponsibly. The more incoherent the party structure becomes, the less effective an instrument is the dissolution, because, without a relatively simple (and disciplined) party system, there is no reliable way of placing clear-cut issues before the electorate. Prime Ministers may, therefore, hesitate to advise Presidents to use it, and Presidents may hesitate to resort to it against the advice of Prime Ministers. The dissolution of 1955, for instance, achieved only one thing, namely, a prolonged period in the wilderness for the Prime Minister responsible, M. Faure! In fact nothing in French Parliamentary life, either before or since the war, has provided any evidence that constitutional rules can impose either Parliamentary or Governmental habits against the will of Parliamentary representatives. With great resource and ingenuity, Deputies have always managed to get round constitutional or legislative obstacles.

Parliament

(a) *The National Assembly*

In addition to the intention to restrict the power of the National Assembly to harass and overturn Governments, the constitution reveals also the definite intention to demote Parliament, and, in particular, the National Assembly. In the first place, both the length of Parliamentary sessions and the scope of Parliamentary activities are reduced. Parliament is to sit for two regular sessions, amounting to a maximum of five and a half months in the year[30] (article 28) as against a minimum of seven months under the Fourth Republic. Article 34 limits its legislative capacity to certain prescribed categories. These include, for instance, questions of civil status and civic rights, liability to taxation and national service, the penal code, declarations of war, electoral laws, the general principles governing the organisation of national defence, education, local government, property, trade unions, social security rights, etc. In all other fields than those specifically enumerated, the Government is empowered to proceed by decree[31] and even, with the permission of Parliament, to encroach on the newly restricted legislative field for a limited period.[32]

The ostensible aim of this delimitation of powers is to remedy the

[29] This is the single-member system with two ballots, used throughout the Third Republic, except for the elections of 1885, 1919 and 1924.
[30] There can, of course, be special sessions, lasting for a limited period (article 29).
[31] Article 37.
[32] Article 38.

tendency of Republican Assemblies to *gouvernement d'assemblée*, a tendency which has led Parliaments to claim an all-pervading omnipotence, resulting too often, in practice, in overwork, incompetence and impotence. As one critic put it: "The National Assembly votes vitally important laws in indifference, and unimportant ones after violent debate."

The restriction of Parliamentary functions has been criticised both in principle and on the ground that it is likely to lead to conflict regarding the respective competences of Government and Parliament.[33] The constitution authorises Parliament to modify the provisions of article 34; they may be "redefined and completed" (*précisées et complétées*) by an organic law. It can safely be assumed that the revision of this article and of that governing incompatibility will be high on the priority list of any National Assembly likely to be elected in normal circumstances. Whether the extension of Parliamentary legislative activities will be an equally high priority for Governments which henceforth control the Parliamentary timetable is another matter!

The second restriction on Parliament consists of changes in legislative procedure, intended, like the measures already described concerning the relations between Government and Parliament, to strengthen the hands of the Government, particularly by preventing obstruction and delaying tactics on the part of Deputies. The number of Parliamentary Commissions is reduced from nineteen to six and Governments may decide not to send a Bill to any of these, but set up a special Commission.[34] This may help to speed up legislation (for Bills were frequently submitted to several Commissions) and also to reduce both the authority of Commissions and the area of conflict between Governments and Commissions. It not infrequently happened under the former system that when the Bill came to be debated in the Assembly, the Minister was confronted with a text amended by the relevant Commission to the point of constituting almost a counter-proposition. And the position of the President of the Commission could become that of a dangerous, and often dangerously well-informed, shadow Minister.

When Bills are debated in the Assembly, Governments will enjoy a number of advantages not possessed by their predecessors. The Government has the right to propose amendments,[35] to refuse to consider amendments not previously submitted to the Commission, and to insist on a single vote on the whole, or a part, of the Bill, including only those amendments proposed or accepted

[33] Conflicts arising from the interpretation of articles 34 and 37 are to be dealt with by the Constitutional Council (articles 37 and 41). On the possibility of conflict, see for instance, Professor Pinto in *Le Monde*, October 28, 1958. The *Conseil d'Etat* expressed the view that article 34 might lead to "grave abuses."

[34] Article 43.

[35] Article 44.

by the Government. The picture of legislation under the Fifth Republic that these provisions conjure up presents a striking contrast with legislative debates under the Fourth, when Governments could introduce amendments only by devious devices, and were compelled to combat droves of amendments from the floor of the House.

Special rules are included in the constitution, governing the procedure for voting organic and finance Bills. Under the Fourth Republic, the term "organic law" was used to describe laws of special importance that might reasonably have been included in a constitutional text. They were voted, however, in the same way as any other law. There is now a special procedure, the essential features of which are that such Bills must be tabled a full fortnight before they are debated and that, if the two Houses disagree, the Assembly can override the Senate only by voting the law by an absolute majority, if the Prime Minister decides to ask the Assembly to vote it. Organic laws are promulgated only after the Constitutional Council has declared them to be in conformity with the constitution.[36]

Special provisions regarding the voting of finance Bills prevent Deputies from using delaying tactics, as they did under the Fourth Republic, to get round the restrictions imposed by the *loi des maxima*, which prohibited them from proposing measures involving increased expenditure or a reduction of revenue. If the Assembly has not completed the first reading within forty days (finance Bills are read first in the National Assembly; other Bills can be read first in either Assembly) the Government is empowered to ask the Senate to read the Bill first, within a fortnight; if the measure has not been voted on at the end of seventy days, its provisions may be applied by a Government ordinance.[37]

Even if it can be assumed that these restrictions will not somehow be evaded, Parliament still retains a vital power. The constitution can require a Finance Bill to be voted on within a certain time. It cannot ensure that what is voted is what the Government wants. And all the measures outlined above to strengthen Governments *vis-à-vis* the Assembly can be nullified if Parliament decides to withhold the necessary supplies. The inevitable result of a direct clash between Assembly and Government would be a return, either to the *immobilisme* of Governments of the Fourth Republic, or to the Governmental instability which was, in reality, only another facet of the same deadlock.

[36] Article 46. An organic law affecting the Senate must have the consent of the Senate. On the Government's transitional powers in respect of the eighteen organic laws required to complete the constitutional provisions, see below, p. 20.

[37] If the Government has itself failed to introduce the Bill in time for it to be promulgated by the beginning of the financial year, it may ask Parliament to authorise taxation by decree, and may itself authorise expenditure by decree, in respect of those sections of the Bill that have been voted. (Article 47.)

Eventually, if the deadlock were to be prolonged, there would develop another "crisis of the régime." And even a dissolution might produce the same results. There are critics of the constitution who argue that the demotion of the Assembly is less likely in practice to strengthen Governments than to encourage frustrated Deputies to use the one effective weapon that they still possess.

(*b*) *The Senate*

The National Assembly is also demoted *vis-à-vis* the Senate. The legislative authority of the Senate is strengthened under the Fifth Republic by the provision [38] that in cases of disagreement between the two Assemblies regarding a Bill, the Assembly can no longer override the Senate, if the prescribed period of negotiation (*la navette*) proves abortive. The Government *may* (there is no obligation) set up a mixed Commission and, if the Commission finally produces an agreed text, submit it to both Assemblies without further amendment. But if no Commission is set up, or if it fails to reach any agreement, the Bill drops unless the Government intervenes to ask, first, for a further reading in both Assemblies, and second, if there is still no agreement, for a final vote by the Assembly on whichever of the texts the Assembly chooses. In effect, this means that, unless the Government is willing to support a Bill, the co-ordinate relationship that existed under the Third Republic is restored.

The prestige of the Senate is also increased in several ways, some of which have been already mentioned. If the President is incapacitated he is replaced by the President of the Senate,[39] and not by the President of the National Assembly as under the 1946 constitution. The Prime Minister may make a specific request for the approval of the Senate,[40] a right that he also possessed under the previous constitution, but which was not "constitutionalised." [41] The President is obliged to consult the President of the Senate on the application of article 16 (emergency powers) and on

[38] Article 45.
[39] Article 7.
[40] Article 49.
[41] The Government is not, of course, responsible to the Senate and so the right to ask for its approval may be of more use to the Government than to the Senate. It has been suggested that Prime Ministers will do so only when they are sure of success!

On the question of the Government's responsibility to Parliament, a problem was created by the wording of the law of June 3, which laid down the framework of constitutional revision. Among the Government's undertakings was that of respecting the principle of "responsibility of the executive to Parliament." In theory, this would include responsibility to the Senate as well as to the Assembly. The President of the Consultative Committee, M. Reynaud, pointed out this limitation in the letter to General de Gaulle accompanying the committee's report. The difficulty was overcome by retaining the word "Parliament" in article 20, and by providing, in article 49, for responsibility to be in practice only to the National Assembly.

the desirability of a dissolution.[42] The concurrence of the Senate is required if the Assembly wants to recommend a referendum.[43] Presidential messages may be addressed to both Assemblies.[44] Senators are to sit for nine years instead of six.[45]

THE JUDICIARY

The separation of the powers of executive and legislature clearly renders necessary some method of resolving any conflicts of competence that may arise. The Constitutional Council, which replaces the Constitutional Committee of the Fourth Republic, is a far more important body. Composed of former Presidents of the Republic, together with nine members, sitting for nine years, and appointed in equal numbers by the President of the Republic, the President of the Senate and the President of the Assembly, it is to be responsible, not merely for decisions regarding the delimitation of executive and legislative competence, but also regarding the regularity of elections and referenda, the constitutionality of (a) all organic laws (which must be submitted to it) and (b) those ordinary laws submitted to it by the President, or by the Presidents of the two Assemblies.[46] On all these subjects, the Council's decision is final. It also acts in an advisory capacity. It *must* be consulted by the President regarding the desirability of applying article 16 (emergency powers), and on the measures to be taken in consequence of its application. It *may* be consulted on the

[42] Article 12.
[43] Article 11.
[44] Article 18.
[45] This last provision is not, of course, constitutional. The constitution left the numbers in each Assembly, the period for which Deputies and Senators were elected, and the electoral system, to be determined by legislation. The conditions in which substitutes are to replace Deputies who become Ministers are also laid down in an ordinance (the term used for legislative enactments by General de Gaulle's Government during the transitional period before the constitution comes fully into force).

It may, perhaps, be useful to give a brief summary of the most important of these provisions. Members of the National Assembly are elected for five years (as under the previous régime) by the system of single-member constituencies with two ballots, an absolute majority being required for election at the first ballot, a relative majority being sufficient at the second. This system applies only to the 465 Deputies elected in metropolitan France and to the *départements d'Outre-Mer*. Algeria elects sixty-seven Deputies, in eighteen constituencies by the list system with a single ballot and a simple majority. Twenty-one of the Deputies are European, and forty-six Moslem. The two Saharan constituencies elect four Deputies.

The conditions of representation of the Overseas Territories have not yet been laid down.

Two new features are worth noting. All candidates now pay a deposit of 100,000 francs, which is forfeited, along with his right to reimbursement of the cost of a certain number of free posters and leaflets, if the candidate does not receive 5 per cent. of the votes. All candidates must name a substitute.

Senators sit for nine years, a third being renewable every three years. The system of election is indirect, the electoral college consisting of Deputies and Senators and representatives of local authorities and of Frenchmen residing abroad.

[46] Articles 37, 41, 56–62.

conformity of international agreements with the constitution or with organic laws.[47]

The supreme Council of the Judiciary, set up by the 1946 constitution, is retained, with the same functions of ensuring the independence of the judiciary, controlling the working of the courts, and advising the President on the exercise of his right of pardon.[48]

As under the preceding constitution, a High Court of Justice, whose members are chosen by Parliament,[49] is to be responsible for trying members of the Government charged with penal offences in the exercise of their functions, and the President of the Republic on a charge of high treason.[50]

The Organisation of the Community

The seventeen articles defining France's relations with her oversea possessions are revolutionary. For the first time in French history, the possibility of independence is formally recognised. The new constitution recognises three different categories among the territories forming the Community. They are: (1) the *départements d'Outre-Mer*, whose administration has been, since 1946, assimilated to that of *départements* of metropolitan France; (2) the *territoires d'Outre-Mer*, or former colonies, now enjoying a considerable degree of self-administration, since the passage of the outline-law of June 23, 1956; (3) *Etats membres de la Communauté*, a new status, nearer to self-government, for which the *territoires d'Outre-Mer* could opt within the six months following the referendum.[50a] Further evolution of member States towards self-government is possible, on terms to be negotiated, if requested either by France or by the territory in question. A request by the territory must be based on a decision of the legislative Assembly, confirmed by a referendum; if a member State wishes to be independent, the same procedure is adopted.

Territoires d'Outre-Mer which do not wish to opt for the status of States within the Community may either stay as they are or choose the status of *départements d'Outre-Mer*. These two categories form part of the Republic; the States do not, and will,

[47] Article 54.

[48] There are some changes in its composition, its powers (which are reduced) and its method of appointment, and it is to work within the framework of a reorganised judicial system.

[49] There are some changes, however: the High Court is now chosen by both Senate and Assembly (in equal numbers) instead of by the Assembly alone, as was the case under the 1946 constitution.

[50] The crime of high treason is undefined (article 68). The decision to bring individuals before the High Court is taken by an open ballot in both Assemblies, an absolute majority being required.

[50a] By the beginning of December, 1958, all the West and Equatorial African Territories, with the exception of Niger and Haute Volta, had notified their intention of opting for the status of member State. Madagascar also becomes a member State.

therefore, not be represented within the French Parliament.[51] A most important provision is that of article 85 which leaves the way open for changes in the institutional framework of the Community (described only in outline) to be modified by ordinary legislation, instead of by constitutional revision.

The Community has been described as a conception somewhere between Federation and a Commonwealth. It will have its own institutions: (1) an Executive Council, composed of the Prime Minister of France, the Heads of the Governments of the member States, and those Ministers responsible for Community affairs, that is, foreign, economic and financial policy, defence, currency and policy concerning strategic raw materials and, except where a special agreement decides otherwise, justice, higher education, and the general organisation of transport and communications; (2) a Senate, composed of delegates chosen by the French and State legislative Assemblies from among their number; and (3) a Court of Arbitration. The President of the Republic is also President of the Community and presides over the Executive Council. The function of the Executive Council is the organisation on the Governmental level of co-operation between the member States of the Community; that of the Senate is the discussion of matters of economic and financial policy, submitted to it by the President, and the consideration of international treaties or agreements under articles 35 and 53 which are binding on the Community.[52]

These constitutional provisions are only a framework, the details being left to be worked out in several organic laws. Until it is known just how the institutions are intended to function, and how easy it will be for member States to assume progressively more responsibility for the management of their own affairs, it is impossible to do more than speculate on the likelihood of the success of the experiment. It does seem clear, however, from the text of the constitution that the conditions of co-operation are intended to be extremely flexible. This is comprehensible, since the territories concerned are at very different stages of political evolution. A great deal will, therefore, depend on the spirit in which the provisions are applied by both sides; on the readiness of France to recognise the need to respond generously to nationalist aspirations in the member States; and on the willingness of the as yet relatively inexperienced leaders of the different territories to be prepared to walk before they try to run. But there is a danger that France may keep them on too tight a rein. As described in the constitution, the functions of the Senate are essentially advisory, executive decisions being impossible only on matters on which there has been specific delegation of authority to the Community. The Algerian Statute, which offered real opportunities for the evolution of Moslems towards self-administration,

[51] Articles 72, 74, 76 and 86.
[52] Articles 78–84.

if French Governments and officials had used them, was finally rejected by even moderate Moslem opinion aften ten years of disillusionment. On the other hand, the 1956 outline-law has certainly encouraged a very rapid political development in many of the African territories. From the point of view of African opinion (for it is in Africa and Madagascar that nationalism is developing most rapidly) the vitally important provision is the constitutional recognition of the right to independence. And the possibility of moving towards it by agreement with France, without encountering the constitutional obstacles presented by the previous constitution, may be a valuable safety valve.

There do not seem to be the same possibilities of evolution for the *départements d'Outre-Mer*, or for those territories that opt to remain *territoires d'Outre-Mer*. It would appear that the latter cannot opt for the status of member States at some later date, if they do not do so within the six months following the referendum. Article 85 appears to deal only with the evolution of member States; and article 73 envisages only adaptations of the " legislative and administrative régime " in the case of the *départements d'Outre-Mer*. There is no mention of the " constitutional " régime.

The constitution makes no mention of Algeria. Nor was Algeria mentioned in the 1946 constitution. The status of Algeria is regarded as being that of a group of *départements d'Outre-Mer*, with certain special characteristics.[53]

Although the constitution provided for accession to independence only under article 86 (which requires the decision to be taken by the territorial Assembly and confirmed by a referendum), General de Gaulle, in his tour of the oversea territories shortly before the referendum, explained that a negative vote by a territory in the constitutional referendum would be interpreted by France as a desire for secession. Only one (Guinea) voted No. A special relationship with France is envisaged for territories that have become independent. They may conclude agreements with France " to develop their civilisation." [54] This article has been interpreted as expressing France's hopes for a co-operative relationship with

[53] See *Statut de l'Algérie*, 1947, and statement of the *Conseil d'Etat*, of March, 1947. Neither of these had constitutional authority. The index to the text of the 1946 constitution, published in the volume of rules of procedure of the National Assembly, has an item: " *Algérie, régime législatif*," referring the reader to article 73 of the 1946 constitution. This article dealt exclusively with *départements d'Outre-Mer*. This might be regarded as semi-official constitutional authority.

The constitutional limitation on the possibility of evolution of the *départements d'Outre-Mer* is of immediate interest only as regards Algeria. The four other *départements d'Outre-Mer* requested this status in 1946, and there has been no sign of their wishing to change it. If Algerian independence were to be proposed in the near future, constitutional obstacles could either be circumvented by legal ingenuity, or the constitution could be revised. Once the political obstacles could be overcome, the constitutional obstacles would be negligible.

[54] Article 88.

the former North African Protectorates as well as for the maintenance of a "family" relationship with States that become independent in the future.

This somewhat superficial summary of the principal provisions and innovations of an extremely long, sometimes obscure, and highly complex document of ninety-two articles is inevitably incomplete. Nothing has been said of the Economic Council (now rebaptised Economic and Social Council), or of the transitional provisions [55] giving the Government of General de Gaulle the right (a) to complete the constitutional provisions by promulgating, in the form of ordinances having the force of law, eighteen organic laws, and also to decide the electoral system; and (b) to extend its own period of special powers, if necessary, beyond the six months for which they were originally granted on June 2, up to four months from the promulgation of the new constitution, following the referendum of September 28. Indeed, the powers are extended in scope as well as in time to include "the measures in every field that the Government judges necessary to the life of the nation, the protection of its citizens or the safeguard of liberties."

One last brief word ought perhaps to be said, however, on the subject of constitutional revision, since this threatens to be as important under the Fifth as it was under the Fourth Republic. In theory, revision is easier than under the 1946 constitution, since the only requirement is that it shall be voted by both Assemblies and ratified by a referendum, unless the President decides otherwise, in which case the two Assemblies meet in Congress and a three-fifths majority is required. The obstacle to revision presented by article 90 of the 1946 constitution (which necessitated two stages) has disappeared. It remains to be seen, however, whether the political obstacles to revision will be less serious than during the previous régime. For the one essential condition remains the same. Parliament—and in the first place the National Assembly—must be able to muster a majority, which is precisely what it proved unable to do throughout most of the life of the Fourth Republic.

Dorothy Pickles.*

[55] Articles 90–92.

* Author of *French Politics* (Royal Institute of International Affairs) 1953, and *France, the Fourth Republic* (Methuen, 1958), etc.

RE-EXAMINING SINCLAIR *v.* BROUGHAM

SINCLAIR *v.* BROUGHAM[1] has always, and rightly, been thought as of fundamental importance.[2] This importance, to be sure, is theoretical rather than practical. Practically speaking, the case merely puts a narrow, if tricky, point concerning the priority of creditors, and this on facts which are unlikely to recur in future.[3] Theoretically, on the other hand, the case offers a number of intersecting problems: contractual capacity and the doctrine of *ultra vires*; the nature of money-claims in law and equity; the notion of "tracing" property and quasi-contractual restitution; even the distinction between rights *in rem* and *in personam*. Clearly these problems are as fresh as they remain challenging.

THE SITUATION

Though empowered only to borrow money for the purpose of building houses, the Birkbeck Building Society started a banking business soon after 1851 when first founded. This business flourished, and the society became one of the important smaller banks of London, known popularly as the Birkbeck Bank.[4] By 1910 liability to the bank-depositors amounted to (roughly) £11 millions, more than ten times the amount the society owed to its shareholders. In 1911, however, there was a run on the bank which drove it into liquidation. As the assets had shrunk, a conflict arose between (briefly) two classes of claimants, the shareholders and the depositors, the situation being complicated by the fact that the banking business was held to be *ultra vires*. Had this business been *intra vires*, no serious conflict would or could have arisen; for the depositors would then have been legitimate creditors clearly entitled to repayment before the members. One may well ask, in passing, how this illegitimate bank could succeed in borrowing so much money. The answer is that some borrowing was quite within the society's purpose. As a building society, its main task was to bring together those willing to lend and those wishing to borrow money for the building of houses, an activity which necessarily involved the services of a banker-intermediary.[5] It had also been

[1] [1914] A.C. 398. For earlier proceedings, *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch. 183.

[2] For discussion of this case, see Lord Wright, *Legal Essays and Addresses* (1939) 1; Holdsworth, *Essays in Law and History* (1946) 238; Hanbury, *Essays in Equity* (1934) 1, 12; Dawson, *Unjust Enrichment* (Boston, 1951) 18. And see Lord Greene M.R. in *Re Diplock* [1948] 1 Ch. 465, 518.

[3] See n. 7, *infra*.

[4] *Cf.* [1912] 2 Ch. 183 at 210, 227.

[5] The nature of building societies was brilliantly discussed by Jessel M.R. in *Re Guardian Permanent Building Society* (1882) 23 Ch.D. 440, 457 *et seq.* The impetus leading to the formation of these societies was not so much the

decided that a rule expressly authorising such a society to borrow without limit was valid, provided the money was borrowed for the purposes of a building society and was borrowed from internal shareholders instead of external lenders.[6] The Birkbeck Bank, however, had gone beyond these limits, changing its role from that of a financing agent to that of a trading banker.[7]

Be this as it may, how were the diminished assets to be distributed and according to what plan of priorities? Neville J. thought that the depositors ought to be postponed to both regular creditors and shareholders, and a majority in the Court of Appeal took the same view. But Fletcher Moulton L.J. dissented on the ground that the depositors should have priority over the shareholders, though not over the ordinary creditors. The House of Lords produced a third and intermediate solution whereby depositors and members were to bear the shrinkage rateably or *pari passu*, that is in proportion to each individual contribution.[8] How do these three contrary results compare with one another? Which solution was the most preferable?

The First Solution

It was, as will eventually appear, Neville J.'s judgment which was the most economical as well as the soundest. Granting that the loans to the Birkbeck Bank were *ultra vires*, the lender was not (in the judge's view) like a highwayman claiming his share of a robbery or like a gambler trying to recover the amount of his lucky wager. The parties had acted under a mutual mistake of law, believing they could borrow and lend money as to a banker; "and although in many cases money paid under a mistake in law is irrecoverable, this rule, I think, is not applicable to a case like the present."[9]

desire of the "industrious classes" to obtain funds by "periodical subscriptions" (as stated in the preamble of the Building Societies Act, 1936), but the desire on the part of capitalists to invest at a higher rate of interest than the usury laws then allowed. *Cf.* Lord Cranworth L.C. in *Fleming* v. *Self* (1854) 3 De G.M. & G. 997.

[6] See *Laing* v. *Reed* (1869) L.R. 5 Ch. 4; *Murray* v. *Scott* (1884) 9 App.Cas. 519.

[7] After the Birkbeck débacle, it would seem most unlikely that a building society would either again borrow, or the public again lend, money in such circumstances. No similar problem could arise in the case of other statutory corporations with limited capacity. For it seems most improbable that a company other than a building society would be able to engage in banking activities for fifty and more years without it being realised that this activity is *ultra vires*. A trading company does not even possess the initial advantage of acting as an intermediary or financing banker, being usually concerned with trading and not immediately with borrowing.

[8] As a matter of sheer possibility, there were two further solutions. A (fourth) solution whereby the shareholders would divide all the assets between them to the complete exclusion of the *ultra vires* depositors. Another (fifth) solution which would allow the *ultra vires* depositors to be treated like regular creditors. The fourth solution was mentioned but regarded as too unjust to be seriously considered. The fifth solution was not even mentioned.

[9] [1912] 2 Ch. at 197.

This conclusion had very good authority. In the *Guardian* case [10] it had, on similar facts, been held that, though creditors and unadvanced shareholders had to be paid in the first instance, a society's surplus assets had to go to the *ultra vires* lenders. Our present depositors, however, were not content with this distribution: it cannot be right, they argued, that the shareholders should be paid before them; it cannot be right, because the society took the money on the footing that they were carrying on a legal business, nor had the depositors any reason to suspect the legitimacy of that business.[11]

The Court of Appeal, by a majority, affirmed Neville J.'s decision. But they also started a line of reasoning which was to become most troublesome. The court emphasised the "voidness" of an *ultra vires* borrowing which could therefore create no debt at law or in equity.[12] To recover anything the lender had to bring himself within the equity of subrogation or within a tracing judgment.[13] But on this basis neither Neville J.'s decision nor the *Guardian* case could make any sense whatever; and indeed the court now felt quite unable to discover (what Jessel M.R. had called) the "plainest principles of equity" which gave the surplus to the improper lenders.[14] These principles appeared to be nothing more than a "rough-and-ready tracing judgment, illogical, but possessing the merit of attempting to do partial justice to the lenders." [15] As the court saw it, the dilemma was as follows: either the borrowed moneys became part of the society, in which case the members were entitled to both principal and surplus; or the moneys were not assets of the society, in which case the lenders became ordinary creditors taking preference to the members.[16]

[10] *Re Guardian Permanent Benefit Building Society* (1882) 23 Ch.D. 440.

[11] For these arguments, see [1912] 2 Ch. at 198 *et seq.*

[12] *Ibid.*, at pp. 207–208. The court found support for this view in *Ex p. Watson* (1881) 21 Q.B.D. 301 and similar cases. It needs to be pointed out, however, that these cases merely showed that an *ultra vires* lender could not prove in a liquidation; they did not necessarily establish the wider principle that such a lender could not recover even if there was a surplus.

[13] *Ibid.*, at p. 232. Buckley L.J. here gave a classified list of five ways of recovery as exceptions to the *ultra vires* doctrine. His classification was, unfortunately, not very helpful. It was too schematic and did not explain the interconnections.

[14] See (1882) 23 Ch.D. 440 at 451. Bristowe V.-C. had well explained the relevant equity: "It would be inequitable for the members of the society who have received [the] money, and had the benefit of it, to say, 'The society is now wound up; all outstanding debts and claims have been paid; all costs have been paid, and there is a substantial residue. We, the members of the society, will take that and divide it amongst ourselves, because you and others had no right to lend it to us—you did wrong in lending it to us, and we did wrong, through our trustees, in taking it, but as we have got it, we will keep it, and you shall not recover it from us.' That appears to me a very inequitable claim." *Ibid.*, at p. 446n.

[15] [1912] 2 Ch. 183 at 209.

[16] *Ibid.*, at pp. 234–235. Later Lord Sumner made the same point: "A ruthless logic would have given all to the shareholders, principal, interest, bonus and

Surprisingly, the Court of Appeal chose to follow the *Guardian* case, even without approving it.

Later the *Guardian* case received more critical attention from Lord Parker. But whereas the Court of Appeal had considered the *Guardian* case illogical because it gave the surplus to the lenders, Lord Parker now thought that to give to the lenders no more than the surplus was not capable of logical justification. This because of two reasons. Suppose a company in poor circumstances incurs *ultra vires* loans which increases its assets and which permits its members to be paid off in full, though this leaves less money for repayment to the lenders. Surely it would not be " in accordance with equity and good conscience " that the members or contributories are paid in full, when " in equity and good conscience the amount of the increase in the assets due to the *ultra vires* borrowings ought to be restored to the lenders." [17] But this point failed to take into account the presence of the *ultra vires* rule whose purpose was precisely to protect the shareholders against *ultra vires* dealings. And once the shareholders had this equity or protection, they had a right to the repayment of their original contributions. Indeed, the *ultra vires* doctrine had to have at least this effect to have practical significance. There was, of course, another " equity," called the doctrine of subrogation, which could give preference to an unauthorised lender by putting him in the position of a regular creditor, provided the *ultra vires* loan had actually been used to pay off the regular creditor. Our present facts, however, did not and could not constitute a case of subrogation, simply because the claims of the *ultra vires* lenders far exceeded those of the ordinary creditors.[18]

Lord Parker also rejected another argument (supporting the *Guardian* case) according to which the lenders had to be postponed in order to identify the surplus by a " process of exclusion "; for only after all legitimate claims were met could what remained over be regarded as a surplus. But in Lord Parker's view the members or shareholders were at law entitled to all the assets, such being the legal effect of the *ultra vires* doctrine.

" Logically, therefore, it would be impossible to arrive at what in equity belonged to the lenders by first satisfying the legal claims of the creditors and members." [19] But this logic was most misleading. For the picture in which shareholders were at law entitled to everything, while in equity they would get nothing, suggested a wrong, because an incomplete, contrast. For one thing, the picture overlooked (as before) the very doctrine intended to shield the

surplus, but this would have held the shareholders entitled to approbate the gains, while bound in law to reprobate the borrowing by which they were acquired ": [1914] A.C. at 457.

[17] [1914] A.C. at 444.

[18] We shall later have occasion to take another look at subrogation: see at n. 56, *infra*.

[19] [1914] A.C. at 445.

shareholders against *ultra vires* losses, a doctrine operating both in law and in equity. For another, giving relief, equitable or otherwise, to the lenders involved a "process of exclusion," as this process was in fact the only means of separating the protected quantum of assets belonging to the shareholders from the remainder or surplus that might be returned to the lenders. Thus we can see that the various criticisms of the *Guardian* principle were hardly sustainable. On the contrary, that principle, far from being illogical, provided the soundest possible solution.

THE DISSENTING SOLUTION

As already said, Fletcher Moulton L.J. adopted a different viewpoint.[20] Though in his judgment the depositors had to be preferred, not postponed, to the shareholders, he agreed that the borrowing was *ultra vires*, so that the debt as such was void and unenforceable in law and equity. Nevertheless, a court could not refuse to regulate the consequences of an *ultra vires* transaction, since the parties could not be left "to keep what they have respectively got hold of without regard to justice as might be the case if the contracts were immoral—true *turpes causae*. The very invalidity of the contract may give rise to rights which the law will enforce or defend."[21] Where, for example, a company acquired a railway through an *ultra vires* purchase, no court would permit it to recover the money and still keep the railway; to hold otherwise would in effect permit a company to profit by "void" transactions. Instead of the distribution adopted in the *Guardian* case ("which is, after all little more than a counsel of despair"), the Lord Justice now recommended an equity that would "purge" the society's assets of the lenders' moneys, leaving the remainder to the members. In other words, while the first solution was a "purge" in favour of the members, the present purge was one in favour of the lenders. The latter "purge," the judge further argued, was the more justified, as the money was obtained by false, though innocent, misrepresentation. "The society cannot be allowed to profit by its own wrongdoing. The claims of the depositors to a return of their money have, therefore, priority over the claims of the members to a return of the amount of their shares."[22] Only in this way, the judge believed, could effect be given not only to the "sound and recognised principles of equity," but also "without in any way failing scrupulously to enforce the restrictions imposed by law on companies or societies of its own creation."[23]

But were these assertions really tenable? More precisely, how

[20] [1912] 2 Ch. at 209–227. This judgment proved of great influence in the House of Lords: see [1914] A.C. at 438–439 (Dunedin); 450–451 (Parker). Also Lord Wright, *op. cit.*, 5–6.
[21] [1912] 2 Ch. at 223.
[22] *Ibid.*, at p. 225.
[23] *Ibid.*, 226.

"scrupulous" was the enforcement of *ultra vires*, if first preference was given to the claims of the depositors? Let us deal with the argument about misrepresentation, an argument subsequently elaborated by Lord Parker.[24] If (as the latter contended) the society's agents borrow money in the course of a banking business, there is not merely an express representation, but also an *implied* representation of an authority to borrow for banking purposes; moreover, this sort of implied misrepresentation can occur through an agent's "carelessness or otherwise."[25] Yet thus extended, every unauthorised transaction would become an "implied" misrepresentation, since the very act of an *ultra vires* borrowing could be said to represent an authority to borrow, especially if the lender was unaware of the exact limits of the company's capacity. Again, such an extension of misrepresentation would completely eliminate the doctrine of *ultra vires*, since the shareholders would lose the protection intended to shield them against the directors' unauthorised dealings, and (paradoxically) they would lose this protection merely by virtue of the directors incurring *ultra vires* commitments.[26] Consider now the (previous) illustration of the *ultra vires* purchase of a railway.[27] What rights have the so-called buyers? As a broad proposition, it certainly is true that the "incapacity to purchase would bring with it an incapacity to acquire the property, and therefore the railway would not belong to them."[28] This proposition, however, introduces a subtle fallacy when applied to things other than railways and such like and when applied to things like (let us say) pebbles or peas and (especially) money or coins, that is, things which can disappear or become indistinguishable in a heap or mass or mixture. In such a case it is meaningless to say that property does not pass or does not belong to the transferee, since the (now indistinguishable) things have anyhow ceased to be recoverable *in forma specifica*. In such a case, furthermore, the method of recovery must depend upon a distribution of assets, a distribution which, if the assets have shrunk,

[24] [1914] A.C. at 450–451.

[25] For this idea see Cotton L.J. in the *Guardian* (*Scott's*) *Case* (1882) 23 Ch.D. 440, 453, 469. Of course, the misrepresentation-argument would have been more forcible had there been a solicitation for loans by the society's trustees or agents: see Bristowe V.-C., *ibid.*, at 445–446n. In *Sinclair* v. *Brougham* there was some difference of opinion as to the guilt of the parties: while Fletcher Moulton L.J. was convinced that justice was entirely on the side of the lenders, Lord Sumner thought that the latter had paid their money and taken their chance: hence "all alike must be deemed cognisant" [1914] A.C. at 452–453.

[26] These remarks do not apply to the case of a deliberate or intentional misrepresentation, in which a plaintiff-lender could certainly recover his money by way of damages or restitution and indeed recover without regard to any priorities. However, the principles we are now discussing do seem to assume a distinction between a fraudulent acquisition and an innocent or mistaken transfer of money, since in the case of the latter the lender would, even on the most favourable view, still be postponed to the regular creditors.

[27] See at n. 21, *supra*.

[28] [1912] 2 Ch. at 233.

requires a plan of priorities in an order either of time or of merit. There is, in short, a world of difference between the recovery of specific things such as railways or horses or what have you and the recovery of other less distinguishable assets. The ramifications of this difference will become clearer during the next stages of discussion.

THE THIRD SOLUTION

In the House of Lords, *Sinclair* v. *Brougham* attained new levels of complexity. But if the law lords seemed to pursue divergent arguments, they were actually more in agreement than at variance.[29] The initial question was whether the appellants (the lenders) could recover their deposits as money had and received to their use.[30] The House was unanimous that this action was inapplicable, notwithstanding some earlier precedents.[31] One reason was that this action was historically founded upon a promise to repay, but that a court could not now impute or imply a promise when this fictitious promise conflicted with the positive law. "The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual."[32] This argument was surprising. In the first place the fictitious promise was not traversable, indeed the fiction had been done away with by legislation.[33] Secondly, had that fiction ever been taken seriously, *indebitatus assumpsit* could never have become the general action for recovering the money, such as money paid under mistake or paid on a void or illegal transaction, or paid on a bargain that failed. For in all these cases the *promise* to repay was in patent conflict with the actual state of facts. For example, if A mistakenly gave money to B, it was obviously untrue that B had promised a return of the money to A.[34] In the third place, therefore, all that the fiction-

[29] Compare Lord Wright, *op. cit.*, 6, and Lord Greene in *Re Diplock* [1948] 1 Ch. 465, 518.

[30] [1914] A.C. at 414 *et seq.*

[31] *Re Phoenix Life Assurance Co.* (1862) 2 J. & H. 441; *Flood* v. *Irish Provident Assurance Co.* [1912] 2 Ch. 597n.

[32] [1914] A.C. at 417. The other lords used similar language, but Lord Sumner's formulation was the most striking: "The court cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid": *ibid.*, at p. 452. See also at 433, *per* Lord Dunedin.

[33] Common Law Procedure Act, 1852, s. 49. And see generally Wright, *op. cit.*, 30–31.

[34] Perhaps this was one reason why Holt C.J. so strenuously opposed the extension of *indebitatus assumpsit*: "the notion of a promise *in law* was a metaphysical notion, for the law makes no promise, but where there is a promise of the party": *Starke* v. *Cheeseman* (1699) 1 Ld.Raym. 538. Lord Haldane seemed to recognise this, when he traced the history of the *indebitatus* count: "For it was just the fiction of attributing a promise in a multitude

argument could mean was that the law cannot both veto a contract and imply one. Unfortunately the argument forgot that we were here concerned not with promise in a "valid" or "true" sense, but with the recovery of money where the contract failed.

More interesting was another reason against admitting the action for money had and received. That reason was that the only remedy at present had to be one *in rem* and could not be a remedy *in personam*. For, as Lord Haldane explained, "to hold that a remedy will lie *in personam* against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into any contract of repayment, is to strike at the root of the doctrine of *ultra vires* as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure."[35] But if there was no right *in personam*, what were the possibilities of an action *in rem*? More particularly, can money be followed or traced as though it were some sort of property? Of course, if the money is in a bag or in a stocking or otherwise identifiable *in specie*, the owner retains a specific right or right *in rem*.[36] However, this proposition needs careful qualification. Though the identified bag of money would be like a specific chattel, consider the ambiguity of the word "identified" in this instance. As money can always be mixed with other money, it has no identity in the way a specific horse has one. Even the "identity" of the bag of money can easily change, since its contents can easily be changed. More importantly, the money itself cannot be identified in any proprietary sense. Even suppose that A gives B bank notes which bear A's earmarks (his fingerprints, sow's ears, pencil marks, etc.), so that no two notes would be exactly alike and the individual notes could be identified or traced. Still, A keeps no right to any one note, since to give him such a right would permit him to appropriate individual notes and thus to withhold their quality as currency. In other words, as Lord Haldane well put it:

> "In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such kind form part of what the law recognises as *currency*, and treats as passing from hand to hand in point, not merely of possession, but of property. It

of cases where in reality there was none which finally gave the action its comprehensive range, and made it available even where no fact importing or implying privity of contract could be proved" [1914] A.C. at 416–417, citing Ames, *Lectures*, 166.

35 [1914] A.C. at 414–415. This line of reasoning had begun with Cozens-Hardy M.R.: see at n. 14, *supra*.

36 This part of the argument had first been suggested by Mr. Buckmaster (as he then was): see [1912] 2 Ch. at 208.

> would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title." [37]

But what next? If we "cannot have a *jus in re* in currency," how could "the whole strength" of the present argument lie "in the idea that the *jus in re* represents the depositors' only right"? [38] The answer is that, probably misled by *Taylor* v. *Plumer*,[39] the House of Lords thought that money could be followed or traced into the hands of a wrongful possessor or transferee, whether he be a thief, or a fraudulent trustee or broker, or someone to whom money is paid under a mistake of fact, the only limitation being "that the relation of debtor and creditor has not superseded the right *in rem*." [40] It is essential to give in full Lord Haldane's striking passage concerning this point:

> "My Lords, it is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person may be in this position, but it is not because of his trust or fiduciary duty. The common law, which we are now considering, did not take cognisance of such duties. It looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me to be, on ground of principle, as true of money paid under mistake of fact or on an *ultra vires* contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee." [41]

Observe at once that Lord Haldane uses the phrase "following money" in a new sense entirely. In particular, having previously admitted that money can only in certain cases (*e.g.*, in a bag) be specifically recovered, he now slips into a more general use of "tracing or following money," though the assumption of specific recovery no longer holds. Moreover, he further assumes that where money has been wrongfully acquired, a proprietary action is

[37] [1914] A.C. at 418. My italics. On money as currency, see *Miller* v. *Race* (1758) 1 Burr. 452, 1 Sm.L.C. 524. See further, Mann, *The Legal Aspect of Money* (2nd ed., 1953), 8 and *passim*.

[38] See Lord Dunedin [1914] A.C. at 436.

[39] (1815) 3 M. & S. 562. A broker was entrusted with a draft of money to buy Exchequer bills for his principal. The broker misapplied the money by purchasing American stock with the intention of absconding. Apprehended before leaving England, he surrendered to the principal the American stock and bullion. The principal sold this and received the proceeds. Was he entitled to keep the money against the assignees in bankruptcy who sued in trover? It was held he could. For the criminal proceedings against the broker, see *R.* v. *Walsh* (1812) 4 Taunt. 258.

[40] [1914] A.C. at 419.

[41] *Ibid.* at p. 420.

available against the transferee. But where A hands B money by mistake or on trust, A does not retain a right to specific property; what A keeps is a right to an equivalent *sum* or *amount*: B now "owes" something to A, but something that A does not "own." Money being currency it is never traced or followed through a chain of holders as happens in the case of a stolen horse or similar specific chattel. Put differently, A cannot trace or follow a "sum" or an "amount," but is confined to a claim for it. Hence what A tries to enforce must be a "personal" right against B; it is also a "personal" claim because (as we have seen) money as currency does not furnish a right *in rem*, since currency allows no right to individual property.

Recovery in Equity

Once, however, the notion of tracing or following property was introduced, the discussion turned naturally to the scope of a tracing order or tracing judgment or (what Lord Sumner called) a "tracing equity."[42] Thus began a laborious argument about *Re Hallett*[43] which all four judges were persuaded now applied. Yet only Lords Haldane and Parker devoted any full attention to its applicability, though on closer examination even their discussion was far from helpful. For they merely managed to give to *Re Hallett* something of a new *mystique*, as if it held untold possibilities. In truth, the doctrine was remarkably simple; an elementary illustration will suffice. Suppose B (a trustee or agent) is left with money belonging to A (his settlor or principal). B is under an obvious duty to return the money to A; conversely, A can always recover the money either at common law as money had and received by B (if the relationship is agency), or recover it in equity as on a resulting trust. Moreover, A (the principal) retains these (legal and equitable) rights against B, whether B still has the money or not. For the fact whether B is solvent or not can only affect his financial ability to repay or refund; the fact of insolvency does not by itself extinguish A's right of recovery against B or B's indebtedness to A. Now what *Re Hallett* decided was in essence this, that A can still recover his money from B, even where B has transferred the money to his bank account.[44] Technically, of course, this transfer creates a new debtor-creditor relationship between B (the trustee or agent) as creditor and the banker as debtor. But as the banker is bound to repay the money on demand, he is in practice also much like a bailee or custodian or watchman for B.[45] Let us restate

[42] *Ibid.* at p. 460.

[43] (1880) 13 Ch.D. 696. The suggestion for applying the principle of this case was made by Lord Haldane L.C. in argument: [1914] A.C. at 404. For fuller discussion of the principle, see Nathan, *Equity Through the Cases* (3rd ed., 1955) 438 *et seq.*; also Scott, *Cases on Trusts* (Camb.Mass. 1951) 811 *et seq.*

[44] *Cf.* Atkin L.J. in *Banque Belge* v. *Hambrouck* [1921] 1 K.B. 321 at 335. See further *Pennell* v. *Deffell* (1853) 4 De G. M. & G. 372; *Frith* v. *Cartland* (1865) 2 H. & M. 417.

[45] See generally Chorley, *Law of Banking* (3rd ed. 1950), 21 *et seq.*

the principal points. Money handed over by way of agency or trust is and remains "trust money" which the fiduciary must return to the principal or settlor or the beneficiaries named by them. Such trust money, furthermore, forms a first priority on the assets or money in the trustee's or agent's hands. Because of this, it matters nothing whether the trust money is in the trustee's own home or is in his bank account, for in the latter case the banker has to repay the money whenever claimed from him. Now it is in this narrow sense that the money is "traced." In simpler terms, the notion of "following" or "tracing" money only means that the "trust money" remains always and immediately repayable by the fiduciary, a repayment which the first priority ensures, so long of course as there is sufficient money in the fiduciary's hands. The situation would be different were we dealing with a regular debtor-creditor relationship. Where C gives money to D on loan, C is not only bound by the terms of that loan, but in case of D's insolvency he must take his luck with all other creditors: two contingencies which clearly intervene between C's right to the money and its repayment by D. In short, what tracing does is to make "trust money" repayable before all other kinds of private indebtedness.

The question now is: how did the doctrine of *Re Hallett* fit the situation of our present case? Our difficulty was not to trace the money into a bank account; the difficulty was whether the society was bound to return money borrowed on *ultra vires* loans, as regards which *Re Hallett* had no information at all. However, Lords Haldane and Parker both spent much time to show that the decision applied. Thus Lord Haldane saw "no reason why the remedy explained by Jessel M.R. in *Hallett's* case, of declaring a charge on the investment of a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is *ultra vires*. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle."[46] Lord Parker's explanation was similar, except that he also tried to discover a fiduciary relationship. Since a company (he argued) cannot by itself or through an agent be party to an *ultra vires* act, the money so borrowed must remain the lender's property. Still, the lender could not recover this money at law, as it had ceased to be identifiable; in equity, on the other hand, the agents or directors were treated as fiduciaries, so that the money in their hands remained trust money belonging to the lender. And so "starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating

[46] [1914] A.C. at 421.

rights of property, though not recognised as such by the common law." [47]

Both these explanations were most unsatisfactory. For to say that "property" did not pass and then to convert the society or even the directors into (resulting or constructive) trustees for the lenders evaded the precise problem to be faced. How could this trust arise or be implied in the first place, and especially after the emphatic announcement that the doctrine of *ultra vires* had to be scrupulously observed? [48] Moreover, why should there be a "personal equity," but not a right *in personam* at law? If, as Lord Haldane just said,[49] a tracing order consists of declaring a "charge" upon the fiduciary's assets, was this "charge" here anything more than a recognised money claim against the fiduciary and much like any other "personal" demand claiming not specific coins but an equivalent amount of currency? It may be true that the "charge" can easily appear like a kind of "property," [50] if only because the charge as trust money takes priority over all other claims by private creditors. The charge, nevertheless, is not "property" in the sense of being traceable like a specific commodity or something that confers specific ownership. Rather is the charge "property" in the sense that every money claim represents a benefit, an asset, an economic advantage. This and previous points can be summarised by saying that *Sinclair* v. *Brougham* cannot be really explained on the basis of the tracing doctrine. What was here called "tracing" or "following" property, was nothing more than a question-begging method to make the society return some of the lenders' money.[51]

Some Final Aspects

Yet if, as argued, *Re Hallett* was inapplicable, was there any other basis of recovery? Lord Dunedin (and after him Lord Wright) strongly argued that the law of quasi-contract or the corresponding equity of restitution provided the wanted answer. Lord Wright saw *Sinclair* v. *Brougham* as an example of a court doing justice

[47] *Ibid.*, at pp. 441–442.
[48] *Ibid.*, at pp. 414–415.
[49] See at n. 46, *supra*.
[50] See Lord Parker [1914] A.C. at 441–442; Wright, *op. cit.*, 8.
[51] Even assuming that *Re Hallett* applied, this would hardly help. Of the two classes of claimants one could not be paid in full. And having established the right of recovery of the depositors, how were they to take: before or after the shareholders? The lords were most disappointing on this, but their final decision was that the depositors could only claim the depreciated assets, *i.e.*, members and lenders must bear the shrinkage *pro rata*. Yet the difficulty about this solution was that the *ultra vires* depositors were thus treated exactly like *intra vires* shareholders, an obvious violation of the *ultra vires* doctrine whose scrupulous enforcement the lords had so often recommended. Nor had this particular solution anything whatever to do with *Re Hallett*. The latter only dealt with deficiencies between the trustee and beneficiaries; it did not at all deal with deficiencies as regards several beneficiaries: see (1880) 13 Ch.D. 696 at 743, *per* Baggallay L.J.

by applying equitable principles where, because of *ultra vires*, the common law itself was powerless to intervene.[52] Lord Dunedin, for his part, spoke of the ideas of "natural justice," of the "supereminent" or "higher" equity underlying the duty of restoring things or money; an equity which arises because the transferor never intended a gift, and there was no other valid transaction, so that the money or things in the hands of the transferee become a superfluity, which if kept would be a pure and unjustified gain to him.[53]

While the larger problem of restitution is quite beyond the scope of this paper, one or two questions cannot be left unattended. In the first place, if (as we were assured) the right of recovery derived from the society's unjust enrichment, why was it necessary to distinguish between quasi-contract at common law and in equity? Why, more precisely, should the *ultra vires* doctrine obstruct the intervention of "legal" quasi-contract, yet remain hospitable to the "equity of restitution"? In short, was a remedy coming from "justice" and a "higher equity" to be differently applied at law and in chancery? In the second place, however just and equitable, relief in restitution is (as Lord Wright insisted) not a matter for a judge's *liberum arbitrium*, but is law that depends on principle.[54] But what sort of principle? No principle was supplied by the law of legal or equitable quasi-contract, since neither branch had a clear or established answer for our present problem. Nor did it really help to speak of unjust enrichment, since the "unjust" elements, the "merits" or "equities," were in this case countervailing and competing. Indeed, one could not even begin to sort out the relevant "equities," except in the context of the *ultra vires* doctrine and the cleavage between the claims of the shareholders and those of the lenders. This was our initial and central difficulty, and a difficulty which still needs solving.

Let us briefly redefine the problem. We need to find a remedy for unauthorised and hapless lenders, but a remedy also justifiable on principle. We are told, on the one hand, that the *ultra vires* doctrine prohibits the creation of any debt at law or equity. On the other hand, there is the important qualification that the law must have, and indeed has, rules which do not merely leave the money with the *ultra vires* borrower. It is this qualification which contains the answer to our problem, once we also go on to ask why the law has those rules or why it does not simply withhold a remedy? One explanation is that the present transaction was "void" rather than "illegal"; the parties were merely mistaken, not in delict; hence the defendant's position could not be better

[52] Wright, *op. cit.*, 2–3, 12–14. Lord Wright was an unduly ardent quasi-contractualist. Of many, perhaps the most typical statement was (at p. 12) that the acceptance of unjust enrichment made the concept of debt logically otiose.

[53] [1914] A.C. at 431, 434, 436.

[54] Wright, *op. cit.*, 25 and *passim*.

than the plaintiff's.[55] Another explanation must take us back to the purpose of the *ultra vires* principle. Consider this briefly in relation to the doctrine of subrogation according to which even *ultra vires* lenders can recover their money, provided that money is used to pay off legitimate debts owed by the corporation. Although this doctrine can be variously described as that the lenders are subrogated to the creditors, or that the improper loan becomes validated, or that the prohibition against *ultra vires* borrowing is not disobeyed in substance,[56] the important thing to notice is that the principal practical effect of the doctrine is simply this, that it prevents a society or company from making good its legitimate trading debts by means of *ultra vires* borrowing. In more detail, subrogation does two things: it helps the *ultra vires* lender, but it also protects the shareholder since subrogation ceases to apply where this would increase his liabilities, *i.e.*, subrogation operates only so long as there are legitimate creditors who would anyhow have priority. This shows exactly how the rule of *ultra vires* is limited or what is its purpose. For implicit in the subrogation-doctrine is the wider policy or principle that while the shareholder is entitled to keep his own assets, he is not entitled to keep the *ultra vires* surplus. Reformulated, this broad principle yields two applications: (i) Where there are regular creditors, the *ultra vires* lender must be repaid before the shareholders, since to postpone the lender would give the shareholders an *ultra vires* surplus to the tune of the payment to the creditors. (ii) Where there are no regular creditors or where the *ultra vires* loans exceed legitimate liabilities, the *ultra vires* lender must be postponed to the shareholders, for since the shareholder's own contribution is protected, the lender can only be entitled to the surplus. If (i) represents the doctrine of subrogation, application (ii) is the rule of the *Guardian* case[57] previously considered. Indeed, subrogation and the *Guardian* case can now be seen not to be separate rules, but to be complementary rules justified by one common principle. The common principle, moreover, does not itself derive from legal or equitable quasi-contract or from an equity of tracing. That principle stems rather from a combination of ideas which now surround the doctrine of *ultra vires*, ideas such as that "void" transactions need not be treated like illegal bargains, or that limited contractual capacity should not confer only one-sided advantage or that mistaken transfers differ from fraudulent acquisitions.[58] In all and in conclusion, the purpose of the *ultra vires* doctrine then seems to be this: to protect both sides, to safeguard the shareholder's interests as well as to minimise the outsider's loss.

Samuel Stoljar.*

[55] *Cf.* the argument of Neville J. at n. 9, *supra*.

[56] For these descriptions as well as the best discussion of subrogation, see *Re Wrexham, Mold and Connah's Quay Ry.* [1899] 1 Ch. 440. More generally, see Gower, *Modern Company Law* (1954) 89 *et seq.*

[57] (1882) 23 Ch.D. 440.

[58] For this point, see n. 26, *supra*.

* LL.M., PH.D.; Senior Fellow in Law, Australian National University, Canberra.

INDUSTRY AS A RIPARIAN USE

It is, of course, one of the most firmly established propositions of English law that a riparian occupier is entitled to make use of the water of a stream flowing past his land, even to the extent of exhausting it, for ordinary purposes connected with the riparian tenement. He may use the water for extraordinary riparian purposes provided he returns it substantially undiminished in quantity and unchanged in quality. A very small deduction, varying with the circumstances of each case, will not be accounted an interference with the rights of lower occupiers. At common law no water at all may be used for non-riparian purposes.

One doubt, however, seems to cling about the precise meaning of the words "ordinary" and "extraordinary" in this context. "Ordinary," of course, always and everywhere connotes ordinary domestic use—drinking, cooking, washing and the watering of cattle—use *ad lavandum et potandum* in the time-honoured phrase—and all other riparian uses are, generally speaking, regarded as extraordinary. The suggestion was, however, advanced in *Ormerod* v. *Todmorden Mill Co.*[1] that in some districts industrial uses may be so common that they could properly be called an ordinary use. Brett M.R., who in the argument [2] appears to have at first assumed that manufacturing was always an extraordinary use, in his judgment at p. 168 said that he was disposed to accept this contention of counsel for the defendant [3] but he expressly said that it was not necessary to decide the point in the case before him. Bowen L.J. at p. 172, whilst also saying that this point did not require decision, was prepared to assume for the purpose of argument that manufacture need not always be extraordinary and in no way indicated that he regarded the suggestion as contrary to principle, and it has received the approval of some textbook writers. Thus Cheshire, *Modern Real Property* [4] and Gale on *Easements* [5] both appear to accept it as good law. The relevant passages from the two books are:

> "Manufacture, in the present connection, is prima facie an extraordinary purpose, though the ultimate solution of this question depends on local trading conditions, and on the use to which the water of rivers is put in the adjoining district." (Cheshire.)
>
> "It has been said that the user which was at one time extraordinary might by changes in the condition of the

[1] (1883) 11 Q.B.D. 155 at p. 167.
[2] At p. 166.
[3] The argument would seem to have been a sudden improvisation.
[4] 8th ed., p. 119.
[5] 12th ed., p. 237.

> property become ordinary; and also that a user which might be extraordinary in an agricultural district might not be extraordinary in a manufacturing district." (Gale.)

Megarry and Wade, *Real Property*,[6] seem to take another line. After giving an orthodox explanation of the meaning of the word "ordinary" in this context, without referring to *Ormerod*, they say in discussing extraordinary purposes: "Such purposes include . . . in some neighbourhoods manufacturing purposes, such as for cooling apparatus."

Since the learned authors do not mention the possibility of manufacturing being an ordinary purpose this may imply that they think that in other neighbourhoods manufacturing uses may not be permissible even though the processes are carried on on what is properly a riparian tenement and even though the water used is restored to the stream substantially unchanged in quantity and quality.

Such a suggestion (if it be properly attributed to them) may derive support from a passage in the judgment of Lord Cottenham C. in *Elmhirst* v. *Spencer*.[7] The passage reads:

> "In the manufacturing districts where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neighbour without a diminution of the usual quantity."

Though the Lord Chancellor so limited his remarks to manufacturing purposes in a manufacturing district, perhaps it could be said that it does not appear that such a restriction was legally fundamental to the point he was making and much less was it essential to the ultimate decision in the case. It seemed merely to be for force of illustration. Lord Cottenham's point seems to be that it would be in the manufacturing districts that the argument which he was rejecting would, if accepted, have its most unsatisfactory results. It would perhaps be over-captious to treat this mild *reductio ad absurdum* as a considered opinion on the permitted limits of manufacture as a riparian use.

Furthermore other dicta and decisions on manufacturing purposes make no reference to the character of the neighbourhood. In the classic judgment of Lord Cairns in *Swindon Waterworks* v. *Wilts and Berks Nav. Co.*[8] the passage on manufacture is as follows:

> ". . . it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes

[6] p. 70.
[7] (1849) 2 Mac. & Gor. 45 at p. 50.
[8] (1875) L.R. 7 H.L. 697 at p. 704.

> connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water."

The deduction of which Lord Cairns speaks is perhaps that small deduction which is permissible even when making an extraordinary use of a stream provided the water is restored in substantially the same quantity. Thus in the most approved general statement of riparian rights there is no express suggestion that in some districts manufacturing may not be a permissible extraordinary use, though it might be argued that this is cloaked under the vagueness of "reasonable."

Other cases on manufacturing use such as *Dakin* v. *Cornish*,[9] *Sharp* v. *Wilson*[10] and *Baily* v. *Clark*[11] make no mention of an *Elmhirst* v. *Spencer* restriction but the reference to *Dakin* v. *Cornish* is perhaps too slight to build any very wide conclusion and the circumstances of the other two cases did not seem to bring the point into question.

Mr. Brett in a footnote to his article "The Right to Take Flowing Water"[12] says in referring to Lord Macnaghten's summary of riparian rights in *McCartney* v. *Londonderry and Lough Swilly Ry.*[13]:

> "There is a suggestion in some of the earlier cases that manufacture had become so prevalent as to make it an ordinary purpose. This has been finally disposed of by Lord Macnaghten's summary."

This, with respect, seems a little too sweeping. *McCartney's* case did not raise a question of the exact boundary between the two classes of riparian use, so that even if Lord Macnaghten had pronounced on this question his remarks would have been *obiter*. The main point at issue was whether the use was riparian or non-riparian. Further, Lord Macnaghten made no express mention of manufacturing use, ordinary or extraordinary, and even if he had adverted to the *Ormerod* point, he might well have felt that in giving a brief outline of riparian rights there was no necessity to enter into backwaters which, even on the most partisan contention, only affected limited districts. In any case, the sentence in the speech describing ordinary use is perfectly capable of being construed in such a way as not utterly to exclude manufacturing. It reads:

"He [the riparian occupier] may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle."[14]

[9] Unreported. Referred to by Alderson B. in argument in *Embrey* v. *Owen* (1845) 6 Ex. 353 at p. 360.
[10] (1905) 93 L.T. 155.
[11] [1902] 1 Ch. 649.
[12] 14 *The Conveyancer* 154 at p. 156.
[13] [1904] A.C. 301 at pp. 306–307.
[14] At p. 306.

The two examples could be regarded as illustrative and not exhaustive of ordinary use.

Salmond on *Torts*, 12th ed.,[15] whilst accepting that manufacture is generally a permissible extraordinary use, makes a strong attack on the *Ormerod* view that it can be an ordinary use, saying [16]:

> ". . . this suggestion has no support in any decision or even dictum and is, it is submitted, unsound. No local custom not amounting to prescriptive right can so derogate from the common law."

At this point it may be appropriate to note one or two further points on the problems here raised. Counsel for the defendant in *Ormerod's* case did cite one case in support of his contention that industry could be an ordinary use, *Earl of Sandwich* v. *G. N. Ry.*,[17] where Bacon V.-C. held that a railway company, as riparian occupiers of a stream crossed by their line, might abstract water for the use of their engines. However, on reading the Vice-Chancellor's judgment [18] it is plain that he regarded industry as an extraordinary use and said nothing to qualify this view in respect of local conditions. He said of the riparian manufacturer:

> "He may take all that is requisite for the purpose of his business, provided only that he does not take so much as injures the other persons whose rights are equal to his own, which injury he can prevent by returning the requisite quantity into the stream."

The case went off on the ground that the railway company had not substantially interfered with the flow of the stream, so that neither in dictum nor decision does it carry the point for which it was cited in *Ormerod*. *Sandwich* was overruled in *McCartney's* case, but on the ground that the user was not a riparian one, so that this does not affect any question as to the content of ordinary and extraordinary use.

The editors of *Words and Phrases Judicially Defined* cite for the word "ordinary" [19] a passage from the judgment of Williams J. in the New Zealand case of *McIndoe* v. *Jutland Flat (Waipori) Gold Mining Co.*[20] from which it seems that *Ormerod* was accepted *obiter* as good law on the manufacture point.[21] The relevant extract runs:

> "In the latter case [*Ormerod*] the Master of the Rolls says that in a manufacturing district, where the use of water for the

[15] pp. 223-224.
[16] p. 224, n. 52.
[17] (1878) 10 Ch.D. 707.
[18] At p. 711.
[19] Vol. IV, p. 92.
[20] (1894) 12 N.Z.L.R. 226, at 238. On appeal (1896) 14 N.Z.L.R. 99 the point was not mentioned. The case involved mining pollution.
[21] Williams J. seemed to go beyond the accepted English position in being prepared to extend the operation of "ordinary use" to pollution as distinct from abstraction. But see Salmond on *Torts*, 12th ed., p. 227. "There is no right

> purpose of drinking or irrigation has become obsolete, he is not prepared to hold that the use of water for manufacturing purposes may not be an ordinary use. Here, however, the use of water for drinking purposes has not become obsolete, because it is partly to keep the water reasonably fit for drinking purposes that these proceedings are taken. The general rule must therefore apply that the circumstances that a trade is useful, and carried on in a reasonable and proper manner and in a proper place, will not justify the pollution of a stream to the detriment of riparian owners."

However, it may be that an English court might not be disposed to attach the same weight to Commonwealth and American views on a question of this character so intimately connected with local geography as they would in other matters.[22] Turning to Salmond's mention of local custom, it would seem that those who would support the *Ormerod* view are not arguing for a local custom properly so-called. In most cases it would be far too difficult to satisfy the necessary conditions.[22a] They argue for the same sort of local flexibility for " ordinary " as is given to " repair " in leases.[23] They also argue for a more realistically modern handling of the general law of the land. They would contend that domestic use and the watering of cattle might properly not only illustrate but also exhaust the meaning of " ordinary " in medieval times but that now, though they may continue to illustrate, they need not exhaust. The courts are in fact being asked to do for " ordinary use " what the House of Lords did for restraint of trade in *Nordenfelt* v. *Maxim-Nordenfelt*[24]—that is, reinterpret old rules thought to be hampering modern developments, as merely illustrations of a more flexible general principle. However, the House of Lords in *Nordenfelt's* case felt that restraint of trade, limited according to

of ' reasonable pollution.' " See also Coulson and Forbes on *Waters*, 6th ed., p. 193. Perhaps the liberality of Williams J. may be explained not only on the ground that the *Ormerod* principle was not to be actually applied but also as based on a perhaps inarticulate desire to limit the burden on nascent industry. He may also have felt that at that date excessive claims were not being made on his country's water supplies. For " reasonable pollution " in Scotland, see Glegg on *Reparation*, 4th ed., pp. 310–311, citing *Armistead* v. *Bowerman* (1888) 15 R. 814, 820.

22 See remarks of Lord Shand on *Pennsylvania Coal Co.* v. *Sanderson* (1866) 56 Am.Rep. 89 in *Young* v. *Bankier Distillery* [1893] A.C. 691, at p. 702 (pollution cases). It was said in both *Wood* v. *Waud* (1849) 3 Ex. 748 at p. 781 (Pollock C.B.) and *Embrey* v. *Owen* (1851) 6 Ex. 353 at p. 371 (Parke B.) that English and American law on riparian rights had diverged in that greater freedom was allowed to the upper proprietor in America than would be permitted here. Some American states have wholly repudiated the English law on riparian rights. For Canada see *Bras d'Or* v. *Dominion Iron & Steel Corpn.* (1911) 9 E.L.R. 348; *McKie* v. *K. V. P.* (1949) 1 D.L.R. 39 affirmed (1949) 4 D.L.R. 497.

22a A custom to pollute for mining purposes in the Stannaries was upheld in *Carlyon* v. *Lovering* (1857) 1 H. & N. 784.

23 See *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42 at pp. 51–52. *Burgess* v. *Wickham* (1863) 3 B. & S. 669 at p. 698 (as limited by *Anstruther-Gough-Calthorpe* v. *M'Oscar* [1924] 1 K.B. 716).

24 [1894] A.C. 535.

the principles in that case, was a very desirable thing; it is rather doubtful whether the courts would feel it was by any means so desirable to give legal sanction to a new category of possibly heavy demands upon the country's strained water supplies by following *Ormerod*, especially since by treating manufacture as always an extraordinary use they both preserve the flow of the streams and achieve a not wholly unjust distribution of the benefit of their use amongst the riparian occupiers. The courts may feel that they can leave heavier industrial claims to prescription [25] and statute.[26] Hence it may well be that if and when the question of the exact nature of manufacturing use is squarely raised the courts will stand firm on the traditional meaning of "ordinary use." At the least, however, it can be said that the matter is clouded in far greater doubt than many references to it might lead one to believe.

A. H. Hudson.*

[25] See 14 Conv. 154.
[26] *e.g.*, Atomic Energy Act, 1946, s. 7.
* Lecturer in Common Law, University of Birmingham.

STATUTES

The First Offenders Act, 1958

On July 7, 1958, there came into operation the First Offenders Act, 1958, which is, to quote its Long Title, "an Act to restrict the imprisonment of first offenders." Sponsored by Sir George Benson, M.P., as a Private Member's Bill, it received support and encouragement from the Home Office, which provided some drafting assistance, and it was almost unanimously welcomed in the House of Commons as a measure which would contribute in some degree to the solution of certain urgent penal problems.

These problems are partly temporary and of an emergency nature. The sharp rise in the crime rate has caused serious overcrowding in the prisons, which are now holding the highest number of prisoners ever recorded, with the result that over 4,500 men have to be accommodated three in one cell, more than double the number at the end of 1956. This Act may contribute towards lessening the pressure on the prisons by reducing the number of committals by something like 2,000 a year. This will effect a saving of perhaps the equivalent of 150 cells—for it must be remembered that the 2,000 who but for the Act would go to prison would do so only for short periods. Although this will be a welcome by-product of the passing of the Act, it was not with this object in view that the Bill was brought forward. The motives which prompted it are deeper and far more significant.

In 1948 the Criminal Justice Act, section 17 (1), restricted the powers of the courts with regard to the imprisonment of young persons. It provided that no person under seventeen years of age should be sent to prison by a court of summary jurisdiction, and that no court of assize or quarter sessions should impose imprisonment on a person under fifteen. The Act went on, in subsection (2), to introduce the requirement that no court should send any person under twenty-one to prison unless of opinion that no other method of dealing with him is appropriate, and to provide that "for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition."

Section 17 (3) introduced the additional requirement that when a court of quarter sessions or a magistrates' court imposed a sentence of imprisonment it should give the reason why in its opinion no other method of dealing with the offender is appropriate, and, in the case of magistrates' courts, the reason shall be specified

in the warrant of commitment and entered in the register of the court. These provisions, so far as they relate to magistrates' courts, were replaced by section 107 of the Magistrates' Courts Act, 1952.

The effect of section 17 of the Criminal Justice Act, 1948, was most dramatic. The following figures from the Report of the Commissioners of Prisons for the year 1952 show the number of persons under twenty-one sentenced to imprisonment in each year since 1946:

1946	3,081
1947	2,861
1948	2,703
1949	1,288
1950	1,467
1951	1,243

Since 1952 the figures have fluctuated a little, but have never reached the 2,000 mark. The figure for 1957 is 1,543. As the Advisory Council on the Treatment of Offenders remark, in their recent Report on *Alternatives to Short Terms of Imprisonment*, May, 1957: "There may well be other factors contributing to the striking reduction after 1948, but we agree with the Prison Commissioners that it is reasonable to ascribe it largely to the operation of section 17."

Now the origin of the present Bill lies in a recommendation of this Advisory Council in the Report referred to. In July, 1955, in response to a suggestion from the Howard League for Penal Reform, the Home Secretary referred to the Advisory Council the question of the desirability of devising suitable alternatives to some of the short terms of imprisonment imposed by the courts. A sub-committee of the Council, on which Mr. George Benson (as he then was) served, considered the matter, and their Report was eventually adopted by the whole Council and was published in May, 1957. The Report shows that there is a stream of short-term priscners through our penal institutions of quite tremendous proportions. Of 28,838 prisoners received into the prisons in 1954, no less than 19,957 received a sentence of six months or less. This is not the occasion to review the Report as a whole and its many interesting conclusions: suffice it to say that among them was the recommendation that section 17 of the Criminal Justice Act, 1948, should be extended to adult first offenders. This had been suggested by the Howard League and was supported by the Magistrates' Association. The recommendation was simply that section 17 should be extended to adults with no previously proved offences; it was not limited as to any particular types of court, nor was any attempt made to define a first offender.

The First Offenders Act, 1958, purports to implement this recommendation, and as such it was welcomed on behalf of the Home Office by Mr. David Renton, M.P., the Joint Under-Secretary

of State for the Home Department, in his speech on the Third Reading (May 2, 1958). But in all the speeches in the House of Commons Debates on the Bill no reference was made, so far as the writer is aware, to the essential difference between the terms of the Act and the provisions of the Criminal Justice Act, 1948, *viz.*, that the former is limited in that it only applies to the magistrates' courts and does not extend to courts of quarter sessions and assize, whereas the latter was a general provision applicable to all courts. Admittedly, the provisions insisting on the court giving the reasons why it sends a person under twenty-one to prison only apply to courts of quarter sessions and magistrates' courts, and the obligation to record the reason on the warrant of commitment and enter it in the court register only applies to magistrates' courts. Courts of assize have been excused for some reason from giving reasons, and courts of quarter sessions from recording those which they must give. But the Act of 1958 only applies to magistrates' courts, hence it follows that courts of quarter sessions and assize can proceed as before with first offenders, and are exempted from the operation of the new Act altogether. Now one would have expected some reasons to be given to justify this in the debates on the Bill. Why exempt assizes, which are not exempt under the Act of 1948, section 17 (2)? Why exempt quarter sessions, which are not exempt under the Act of 1948, section 17 (3), and are unaffected by section 107 (3) of the Magistrates' Courts Act, 1952 (relating to giving reasons)? It is not a sufficient reason that after the Act of 1948 sentences of imprisonment of persons under twenty-one fell by 60 per cent. in magistrates' courts. It might be argued that the majority of the cases are decided in the magistrates' courts. But that is not so true of first offenders as it is of persons sentenced under twenty-one. It is submitted that the omission of the higher courts from the ambit of this Act is most regrettable and quite unjustifiable.

Furthermore, the way in which the Act seeks to define a first offender is open to serious criticism. Section 1 (3) states that a person falling to be dealt with for an offence shall be treated as a first offender if, but only if, he has not since attaining the age of seventeen been convicted of any other offence, except an offence not punishable with imprisonment. Now one can understand that a person who has been convicted of a minor statutory offence which is only punishable by fine should be regarded as not having been previously convicted for the purposes of this Act. He has never been in jeopardy of imprisonment, one might say, and must surely be regarded as a first offender on the first occasion when he appears and is convicted for an offence punishable with imprisonment. But why should an artificial line be drawn at the age of seventeen, and only offences committed after this age has been attained be considered? Again, no explanation is forthcoming from a study of the parliamentary debates.

This provision clearly has the effect of extending the operation of the First Offenders Act to many who may not be, on any view of the facts but the artificial one which the Act imposes, regarded as "first offenders." Persistent juvenile offenders are to be regarded as first offenders if they commit an offence after the age of seventeen. If they are still under twenty-one they already cannot be sent to prison unless the court is satisfied that no other method of dealing with them is appropriate, by virtue of the operation of section 17 of the Criminal Justice Act, 1948. The Act of 1958 is irrelevant here. But if they are over twenty-one then they are to be regarded as first offenders notwithstanding that they may have a long record in approved school, detention centre or borstal. Insofar as this means that once one is an adult the court must think twice before continuing the mishandling which may have accounted for the long record of the accused, it is obviously welcome. It is doubly welcome for the genuine first offender. But let no one think that all the persons falling to be dealt with under this Act will be genuine first offenders. It is submitted that the Act is not a genuine First Offenders Act, by reason of the very wide definition of a first offender in section 1 (3).

Let us try and imagine the problem as it faced the draftsman. He might well consider that it would be absurd to withhold the benefits of the Act from an adult whose only previous offence had been committed during childhood or adolescence. Hence he draws a line at seventeen and states that anything which happened before this time does not count. But is it really quite so simple as that? This difficulty of defining a first offender might well have prompted a quite different solution, based on the simpler criterion of first prison sentence. The court could have been required before sending any offender to prison for the first time to consider the position carefully in the light of all the available information, including a probation report, and give reasons why, if it decided to send him to prison, it considered that no other method was appropriate. This would have avoided all problems of defining a first offender, which, it is submitted, have not been very satisfactorily solved in section 1 (3) of the Act.

Under the Act, it is estimated that about 2,000 persons will not be sent to prison in future who might have been so dealt with previously. This is a mere drop in the ocean as far as the Prison Commission is concerned, but at the present critical stage every little helps. More important is that the saving of so many persons from the devastating experience of a first sentence of imprisonment may be a major contribution towards combating recidivism. Eighty per cent. of persons who go to prison for the first time never repeat the experience. They cannot all come out reformed characters, and the likelihood is that for many of them prison is a wholly unnecessary experience. Sir George Benson is to be warmly congratulated for seeing to it that Parliament implemented the recommendation

of the Advisory Council with regard to section 17 of the Criminal Justice Act, 1948, though there may be reason to criticise the precise terms in which the recommendation has been implemented.

J. E. Hall Williams.

Matrimonial Proceedings (Children) Act, 1958

In the summer of 1958 Parliament passed six statutes dealing with the family and with child welfare. Perhaps none of them is potentially of greater practical importance than this Act which gives effect to a number of Recommendations of the Royal Commission on Marriage and Divorce.[1] The policy of these Recommendations was to enlarge the jurisdiction of the High Court and of the Scottish courts to provide for the welfare of children of broken marriages. "Each year in Great Britain some 20,000 children under the age of sixteen are affected by the divorce of their parents."[2] The present Act seeks to ensure that the parents give full consideration to the question of the future welfare of the children and to make the control of the court over their welfare more effective.[3] A number of Recommendations serving this policy have already been implemented by the Matrimonial Causes (Amendment) Rules, 1957,[4] *e.g.*, that either spouse if claiming custody of the children must give full particulars of the arrangements proposed for their support, care and upbringing,[5] and that the court may, if it thinks fit, order the children to be separately represented.[6] Moreover, the Recommendation that the court welfare service introduced in the Divorce Court in London after the Denning Report[7] should also be introduced in the Provinces[8] has been largely implemented by administrative action. Certain Recommendations, however, required legislation, and this is where the present Act comes in. Its Part I[9] deals with England and Wales, and its Part II contains parallel provisions for Scotland. The following observations are confined to Part I.

There will not in future be any justification for considering the fate of the children as a matter "ancillary" to the matrimonial relief sought by either spouse. It was the declared policy of the Royal Commission that "in every divorce case the interests of the children" should "be an issue before the court and that that issue" should "be recognised as one which is just as important as the question of divorce."[10] Much the most fundamental innovation

1 Cmd. 9678.
2 Cmd. 9678, para. 360.
3 *Ibid.*, para. 372.
4 S.I. 1957, No. 176.
5 Recommendation No. 33, para. 374 of the Report.
6 Recommendation No. 94, para. 927 of the Report.
7 Cmd. 7024.
8 Recommendation No. 35, para. 389 of the Report.
9 ss. 1–6.
10 Para. 376.

serving this object is that which is inaugurated by section 2 of the Act and which implements Recommendation No. 32.[11] The gist of the new provision is that the court will not normally make a divorce or nullity decree absolute or a separation decree unless and until it is satisfied that for the care and upbringing of each child of the parties under sixteen " arrangements have been made . . . and that those arrangements are satisfactory or are the best which can be devised in the circumstances " or else that it is impracticable for the party or parties appearing before the court to make such arrangements. The reference in section 2 (1) (*b*) to " the party " as well as " the parties " is significant: the new rule will apply in defended as well as in undefended cases, and irrespective of whether an application has been made for custody, or, if made, been opposed. The new principle is openly " paternalistic," and rightly so. It is an antithesis of procedural *laisser-faire*. The role of the court welfare service in carrying it into effect should be very important, and, provided the welfare officers have the right personalities and the appropriate training, beneficial. In circumstances making it desirable to avoid delay (*e.g.*, to expedite a second marriage of either spouse where this is necessary to ensure that a child of the second union is born legitimate) the court may be content with suitable undertakings given by the parties or either of them. One by-product of the new provision is that a new significance now attaches to the dichotomy of decree nisi and decree absolute, but, as the treatment of separation decrees in the Act shows (there is no decree nisi in separation proceedings), if ever it was decided to abolish this dichotomy, the principle of the new provision could be adapted to that situation.[11a]

In accordance with Recommendation No. 36, the Act has widened the circle of those children over whom the court has jurisdiction in matrimonial proceedings. A part of this Recommendation, *viz.*, that the jurisdiction of the court under section 26 of the Matrimonial Causes Act, 1950, should extend to the illegitimate children of both spouses, was carried into effect by the decision of the House of Lords in *Galloway* v. *Galloway*.[12] On the other hand, the Recommendation to include all children living in the family and maintained by either spouse (except boarded-out children) has not been accepted. Section 1 does, however, go so far as to include all (legitimate, adopted or illegitimate) children of either spouse who have " been accepted as one of the family " —it is thus that the concept of the family as a household community which is inherent in social legislation makes its appearance in legislation applied in the Divorce Court. In assessing the financial

[11] See paras. 368 *et seq.* and 398 *et seq.*

[11a] For a more detailed analysis of the relevant Recommendations of the Royal Commission (and thus of the background of the new Act) reference is made to the article by Miss O. M. Stone in 19 M.L.R. pp. 601 *et seq.*

[12] [1956] A.C. 299.

liabilities of either spouse towards children not his or her own, regard will be had to the extent to which that spouse had in fact assumed responsibility for the child's maintenance and also to the maintenance liability of third persons, *e.g.*, the natural father. The redefinition of the jurisdiction of the court over children has led to a number of auxiliary provisions. Thus the only rule which in the past has linked the outcome of the divorce proceedings with the welfare of the children [13] was the provision which makes it incumbent on the court to have regard to the interests of the children when dealing with an application to allow a divorce petition to be presented in the first three years of the marriage. This has been extended to apply to all children over whom the court now has jurisdiction.[14] The new definition of the court's jurisdiction will also apply to restitution proceedings [15] and, what is much more important, a wife's petition for maintenance under section 23 of the 1950 Act can in future be based on the fact that the husband has been guilty of wilful neglect to provide reasonable maintenance for an illegitimate child of both spouses.[16] For this purpose a child of either spouse who is not a child of the other spouse is not taken into account, and the provision is thus, as it were, a footnote to *Galloway*. Like that case it shows that the injustices worked by section 1 (2) of the Legitimacy Act, 1926, which robs the *filius adulterinus* of the benefit of legitimation by the subsequent marriage of his parents, are intolerable in practice, that this rule in the Legitimacy Act is out of tune with the realities of life, and that its practical significance is being gradually whittled down. Why retain on the statute book what is little more than an atavistic attempt to put a stigma on the offspring of an adulterous union?

The policy of the statute, like that of the Recommendations on which it is based, is to give the court full jurisdiction to look after the welfare of the children of all broken marriages which come before the court, irrespective of whether the marriage is dissolved or any other matrimonial relief granted. This means that the court can regulate the custody, maintenance and education of, and access to, the child, not only where a divorce, nullity, or separation petition succeeds but also where it is dismissed. It further means that the court has jurisdiction over the custody, and presumably the education (the omission of this word in section 4 (1) is probably without practical significance) of the children concerned whenever it makes a maintenance order under section 23 of the 1950 Act, a very important matter indeed. Recommendations to this effect were made by the Royal Commission [17] and implemented by sections 3 and 4 of the Act. The court has no such power where

[13] Matrimonial Causes Act, 1950, s. 2 (2).
[14] s. 2 (3) of the new Act.
[15] s. 1 (5).
[16] s. 1 (4).
[17] No. 39, see paras. 402 and 403 of the Report.

it dismisses an application under section 23, a *casus omissus*. That the court now has power to regulate the welfare of children of a marriage which the parents or either of them have unsuccessfully sought to terminate is a matter of principle. It is an admission by Parliament that the whole theory of the divorce law is wrong. The denial of the dissolution of the marriage does not restore the marriage: it sounds like a commonplace but the entire divorce law rests on the assumption that only one of those "grounds" on which a divorce or separation can be granted gives the spouses the right to live apart. Section 3 of the new Act shows that where the law is prompted by a realistic desire to help, that is, in this case, to promote the interest of the children, it must ignore the outdated fictions on which the divorce law is founded.

Neither under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, nor under the Affiliation Proceedings Act, 1957, nor under the Matrimonial Causes Act, 1950, s. 23, can a child proceed against his father or mother with a view to getting maintenance payments: the right vests in the mother, or, very exceptionally, in the father. However, under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*c*), and, in certain cases, under the Affiliation Proceedings Act, 1957, s. 5, the magistrates' court can order the payments to be made to a third person (*e.g.*, to the collecting officer of the court) and thus safeguard the rights of the children against the mother. No such power exists under the Matrimonial Causes Act, 1950, s. 23, and an attempt to obtain an order for payments under section 23 directly to the children failed before Collingwood J. in *Logan* v. *Logan*.[18] The gap revealed by this decision has been closed by section 4 (2) of the new Act. The husband can be ordered to make unsecured or secured maintenance payments to the child or to a third person for his benefit. This has always been the law under section 26 with regard to maintenance after a divorce, nullity, or separation decree, and has now been extended to maintenance orders granted outside any other matrimonial proceedings.

The court has, under section 26 of the 1950 Act and now, by virtue of section 4 of the new Act, under section 23 of the 1950 Act, the right to entrust the custody of a child to a third party, *i.e.*, to a suitable relative or friend. The power is very rarely exercised; presumably what normally happens where neither parent is fit to exercise custody is that either the child is made a ward of court and the necessary steps are taken by the Chancery judge or (more frequently) that the Juvenile Court finds the child to be in need of care and protection and, under section 62 (1) (*b*) of the Children and Young Persons Act, 1933, commits him to the care of a fit person, in most cases a local authority which, by virtue of section 76 of the Act, cannot refuse to accept

[18] [1954] 1 W.L.R. 1050.

the charge. The new Act [19] implements a Recommendation [20] of the Royal Commission by which the Divorce Court can, in exceptional circumstances, instead of making a custody order, commit the child to the care of the council of the county or county borough in which he is resident. The court must be satisfied that it is impracticable for the child to be entrusted to either parent or to any other individual and must hear the local authority before making the order. It can thus, as it were, assume the functions usually exercised by the Juvenile Court. It is laid down that the provisions in Part II of the Children Act, 1948, which apply to children received into its care by a local authority under section 1 of that Act as well as to children under the care of the local authority by virtue of a fit person order are also to apply to children committed to the care of the local authority by the Divorce Court. This is subject to certain modifications, *e.g.*, to the effect that the local authority is subject to the directions of the court. The status of the local authority in relation to the child is not, however, entirely clear. It is true that, by virtue of section 5 (3) of the Act, neither a parent nor any other person can claim the child from the local authority as long as the order is in force. There is nothing, however, in the new Act to make section 75 (4) of the Children and Young Persons Act, 1933, applicable to children who have been committed to the care of the local authority under the new Act. This provision in effect vests parental power in the local authority. It is not quite clear why the rules applicable to fit person orders were not simply extended to the new type of order, and why the reference in section 5 (1) is not to fit person orders but to section 1 of the Children Act, 1948, under which children are temporarily received into care by local authorities. The local authority has no power to make arrangements for the emigration of the child. The order lapses when the child is eighteen, and no order can be made after the child has reached the age of seventeen.

The Juvenile Court can place a child for a period up to three years under the supervision of a probation officer or some other person appointed for the purpose.[21] The Royal Commission (Recommendation No. 38, see para. 396 of the Report) took the view that a similar power should be given to the Divorce Court. This has been done by section 6 of the Act. Like an order under section 5 it is only made in exceptional circumstances, but unlike section 5, section 6 presupposes that a custody order has been made. The two sections cannot therefore ever be applied together. The Divorce Court can, unlike the Juvenile Court, order that the supervision is to be exercised either by a probation officer or by a local authority which means in practice by the children's officer

[19] s. 5.
[20] No. 37, see para. 395 of the Report.
[21] Children and Young Persons Act, 1933, s. 62 (1) (*d*).

acting under the children's committee.[22] Whether in a given case it is preferable to entrust this important function to the probation officer or to the children's officer may be a very delicate question indeed. The views of social workers on these matters are perhaps not always unanimous.

Orders made under section 5 or 6 can be varied or discharged by the court at any time. When a child is under supervision, a custody order can still be varied under section 26 of the 1950 Act, but only at the instance of the court itself.

This new Act must be welcomed as a step in the right direction. One wonders how much water will have to flow under the bridges until it is laid down that the welfare of the children should also be a decisive factor in determining whether a marriage should be dissolved.

O. Kahn-Freund.

The Matrimonial Causes (Property and Maintenance) Act, 1958

The Act is intended to give effect to some of the minor Recommendations of the Royal Commission on Marriage and Divorce. They are " minor " if compared with the great problems of family law, such as the dissolution of marriage and the responsibility for the custody and education of children. But each of these small reforms will appear as anything but unimportant to those whom they affect in a practical situation. What is regrettable is the inveterate habit of dealing with these problems piecemeal. Still —half a loaf is better than no bread.

The four Recommendations of the Royal Commission which the Act seeks to translate into law refer to the following matters:

(i) The time at which the High Court may order one spouse to make financial provision for the other after a divorce, nullity or separation decree.[1] This is dealt with in section 1 of and in the Schedule to the Act.

(ii) Measures to be taken by the High Court to avoid dispositions made by one spouse to defeat the other spouse's claim to maintenance or other financial relief.[2] This is dealt with in section 2, and in section 5 (1) and (2) of the Act.

(iii) The power of the court to order provision to be made for a former spouse out of the estate of her or his former husband or wife, *i.e.*, an extension to a former spouse of the principles of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952.[3] This is dealt with in sections 3, 4, 5 (3) and (4), and 6 of the Act.

(iv) The extension or, if one likes, the clarification of the scope

[22] s. 6 (3) in conjunction with ss. 39 and 41 of the Children Act, 1948.
[1] Cmd. 9678, paras. 480, 481, 504–511, and Recommendation No. (56).
[2] Cmd. 9678, paras. 531–534, and Recommendation No. (64).
[3] Cmd. 9678, paras. 522–525. Recommendation No. (61).

of section 17 of the Married Women's Property Act, 1882, so as to eliminate the effect of the decision of the Court of Appeal in *Tunstall* v. *Tunstall* [4] and to give the court power to order a money payment and to apply section 17 in cases in which the relevant assets are no longer in the hands of the spouse against whom the application is directed, and also so as to remove doubts regarding the power of the court to order a sale of property.[5] This is dealt with in section 7 of the Act.

(1) The problem of the time at which the court can make a maintenance order or other order for financial provision between husband and wife or for the benefit of a child arises in all those cases (but only in those cases) in which the law has hitherto used the ambiguous and awkward formula "on any decree." In practice the most important cases are section 19 (2) and (3) of the Matrimonial Causes Act, 1950, the provisions which refer to secured and unsecured maintenance after a divorce or nullity decree, but there are also the cases of secured maintenance for children [6] and of permanent alimony after judicial separation.[7] Hitherto it has been the practice of the courts to require the wife (or in those exceptional cases in which the wife is liable to pay maintenance: sections 19 (4), 20 (3), 26 (3), the husband) to make the application within a reasonable time after decree absolute at the latest, and to insist on the need for special leave if the application was made more than two months after that date. It was a common practice for a wife not at present in need of maintenance but foreseeing this contingency in the future to ask the court for a nominal maintenance order capable of being varied under section 28 of the 1950 Act. All this will now go. In future the court can make the order on pronouncing the decree nisi for divorce or nullity or at any time thereafter, whether before or after decree absolute, or on or at any time after a separation decree. As hitherto, however, no order can be made prior to the decree nisi of divorce or nullity or take effect prior to decree absolute: section 29 of the 1950 Act remains unchanged. Although the applicant is no longer tied down to rigid time limits, she (or he) can as in the past spoil her (his) case by delay, and the Act makes it clear that in the future no more than in the past can the court be prevented from taking this into account. Nothing in the new Act prevents a former wife from making a maintenance application even after her remarriage, and in a situation such as *Snelling* v. *Snelling* [8] this will continue to be more than an academic proposition. The Recommendation (No. (51)) of the Royal Commission

[4] [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310.
[5] Cmd. 9678, paras. 601 and 705, Recommendation No. (85).
[6] s. 26 (3).
[7] s. 20 (2).
[8] [1952] P. 259.

that her right to maintenance should cease on remarriage has not so far been accepted.

(2) There are various ways in which a husband can seek to defeat his wife's claim to matrimonial maintenance. He can divest himself of assets or of income in order to represent himself as unable to afford maintenance or maintenance beyond a certain level, or he can attempt to frustrate or at least to impede the enforcement of an order by a disposition in favour of a third party.[9] The need for the intervention of the court may thus arise both during the proceedings intended to lead up to an order for financial relief, or after the making of the order. The new Act provides that the wife may make the application to set aside dispositions both in the course of proceedings for financial relief, and after having obtained an order, but, at whatever time the application is made, the court cannot set aside any disposition made more than three years before the application.[10] The court may set aside any disposition other than a will,[11] and give consequential directions "including directions requiring the making of any payment or the disposal of any property" (such as, *e.g.*, presumably a reconveyance to the husband).[12] Here a vast field of interpretation is left open, and one can only hope the courts will construe section 2 (2) liberally, so as to include, *e.g.*, a retrospective order for increased maintenance and also if needed a lump sum payment to the wife. The relationship between this procedure and that under section 28 of the Matrimonial Causes Act, 1950, will in any event have to be clarified.

The procedure is available to a wife who is seeking to obtain or has obtained orders for unsecured or secured periodical payments under section 23 of the Matrimonial Causes Act, 1950, or secured or unsecured maintenance after a divorce or nullity decree under section 19 (3) or (2), or permanent alimony after separation or after a restitution decree or an order for secured or unsecured periodical payments after a restitution decree,[13] but not in connection with alimony *pendente lite*. It would unfortunately not seem to be available in connection with a maintenance order made by a magistrates' court and registered in the High Court under Part I of the new Maintenance Orders Act, 1958. It is, however, available to the husband in those exceptional cases in which he can in the High Court claim financial relief against his wife or former wife[14] —the general Recommendation of the Royal Commission[15] to equalise the position of husband and wife with regard to maintenance has not so far been accepted, and the relevant cases are

[9] s. 2 (7).
[10] s. 2 (1) and (5).
[11] See s. 8.
[12] s. 2 (2).
[13] ss. 20 (2), 22 (2) (4).
[14] s. 5 (1) and (2) of the new Act.
[15] Nos. 53 and 54.

those of an order for settlement of the wife's property after a divorce,[16] orders that can be made in the very rare case of a restitution decree,[17] and maintenance and alimony orders where a divorce or separation decree was based on the fact of the husband's insanity.[18]

In one respect—and this is decisive—the Act is very much better than the Recommendation on which it is based. The Royal Commission (No. 64) had recommended that it should be for the applicant to show that the disposition had been made for the purpose of defeating her (his) claims, a *probatio diabolica* the need for which might have made this provision as ineffective as section 172 of the Law of Property Act, 1925,[19] which in a similar situation requires proof of "intent to defraud." The Act (s. 2 (4)) provides that the subjective fact (intention to defeat the wife's claim) will be presumed if the objective fact is proved, *i.e.*, if it is proved that the disposition would, if not set aside, have or (s. 5, proviso (*b*)) has had the consequence of defeating the claim.

Bona fide purchasers for valuable consideration are protected,[20] but "valuable consideration" does not include marriage, a point which may obviously be of great importance in practice.

(3) Unsecured maintenance orders made in favour of a wife (exceptionally a husband) in the case of divorce or nullity decrees are, according to section 19 (3) of the 1950 Act, for joint lives only so that the wife has no rights against the estate of her former husband if he predeceases her. This is a situation which calls for an extension of the principles of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, and the Royal Commission whose terms of reference excluded questions of the law of succession was sufficiently aware of the close connection between the law of inheritance and the law of marriage to make a recommendation accordingly.[21] Needless to say, the problem arises in cases of intestacy as in cases of testamentary succession: in practice the intestacy situation may be more important in this context than in those cases which were by the 1952 Act brought within the orbit of the law of family provision. Like the 1938–52 Act the new provision[22] applies only if the deceased had his last domicile in England, but it applies to his entire estate—movable or immovable, wherever situated. It can, however, be invoked only by a former spouse whose marriage was dissolved or annulled by an English court,[23] whereas the domicile of the deceased at the time of the divorce or nullity proceedings or

[16] s. 24 (1) of the 1950 Act.
[17] s. 24 (2).
[18] ss. 19 (4), 20 (3).
[19] The old Statute 13 Eliz. 1, c. 5.
[20] s. 2 (3).
[21] See para. 525.
[22] s. 3 (1).
[23] s. 3 (6).

the domicile of the surviving spouse at any time is irrelevant. It may lead to very difficult questions in the conflict of laws.

Fortunately the so-called "innocence" of the applicant has not been made a condition for the application, which can be made by any wife or husband [24] whose marriage has been dissolved or annulled, provided she or he has not in the meantime remarried, no matter whether at the time of the death of the first husband (or wife) the second marriage still subsists (s. 3 (1)—to have this effect the second marriage must presumably be valid, *i.e.*, neither void nor voidable and annulled). Moreover, as under the 1938–52 Act, any periodical payments ordered to be made out of the estate terminate not only with the surviving spouse's death but also with her (his) remarriage.

The substantive condition is similar to that of the 1938–52 Act: that the deceased has not made reasonable provision for the applicant and that it would have been reasonable for him to do so.[25] The court will have a wide discretion [26] and take into account very much the same matters as it considers under the 1938–52 Act, including, however, maintenance orders and other orders for financial provision made during the deceased's lifetime, or the reason why no such order was applied for or granted: the absence of a maintenance order does not deprive the court of jurisdiction to apply the Act though it is perhaps not very likely that, in such circumstances, it will be frequently exercised.

As under the 1938–52 Act the order will be to the effect that provision must be made in favour of the applicant out of the "net" estate [27] as defined in the earlier Act, and it will be an order for periodical payments, except that where the value of the net estate does not exceed £5,000 there may be an order for the payment of a lump sum.[28] Most surprisingly (is this an oversight?) unlike the 1938–52 Act [29] the new Act does not say that periodical payments ordered under the Act must not in the aggregate be at a rate exceeding the annual income of the net estate. Is it really intended that a former wife should have more far-reaching rights than the woman who was the deceased's wife at the time of his death? Nor is there anything about the relation between rights under the 1938–52 Act and under the new Act, and this, although, paradoxically enough, the 1938–52 Act will continue to be administered by the Chancery Division whereas the new Act will be administered by the Divorce Division. Is the question of priorities entirely to be left to the discretion of the courts? The application must, under both Acts, be normally made within six months from the date on which representation is first taken out, though the

[24] s. 5 (4).
[25] s. 3 (2).
[26] Compare s. 2 (4) of the new Act with s. 1 (5) of the 1938–52 Act.
[27] s. 3 (2) (6).
[28] s. 3 (5).
[29] s. 1 (3).

court can grant exceptions which in some respects are, again surprisingly, more generous under the present than under the 1938–52 Act. Many of the technical provisions, including those on variation of orders, are, with modifications, taken over from the 1938–52 Act.[30]

The majority of the people, *i.e.*, the bulk of the wage-earners, do not leave any estates out of which provision for a former spouse can be made, and the wealthy may frequently make maintenance agreements which, if proper words have been chosen, are liabilities of the estate of the predeceasing spouse, or they may obtain orders for secured maintenance under section 19 (2) of the 1950 Act which do not constitute a legal alternative to orders under the present Act but which may obviate the need for invoking the present Act. The new provision, like the 1938–52 Act, is largely a measure for the benefit of women belonging to the middle classes, old and new. For them it removes an injustice.

(4) Section 7 of the new Act provides that either spouse [31] may invoke the discretion of the court under section 17 of the Married Women's Property Act, 1882, even where the money or property in question is no longer in the hands of the respondent or where the applicant does not know whether it is. Thus the new provision removes the principle, laid down by the Court of Appeal in *Tunstall* v. *Tunstall*, *supra*, that an order under section 17 can only operate on existing identifiable assets. As a necessary corollary the new section empowers the court to make an order for a money payment.[32] The discretion of the court extends to the making of orders with respect to property representing money or property which was at one time in the hands of the respondent.[33] All this, as well as the subsection clarifying the power of the court to order a sale,[34] would have been quite unnecessary if some courts had not put a restrictive gloss on section 17. Section 17 would have been capable of an interpretation giving the courts the widest power to deal with the spouses' affairs *ex aequo et bono*: the very elaborateness of the new section may have the unfortunate result of further reducing this discretion through the application of arguments *e contrario*. It is, for example, not at all clear whether the new section has succeeded in eliminating the effect of *Re Camkin's Question*.[35] The new section seems to presuppose that some identifiable asset must at any rate at one time have existed. Does it deal with the case of simple monetary obligations, *i.e.*, debts between the spouses, with which the *Camkin* decision was

[30] See ss. 1 (5), 4, 6.
[31] See s. 7 (5).
[32] s. 7 (3).
[33] s. 7 (4).
[34] s. 7 (7).
[35] [1957] 1 W.L.R. 255; [1957] 1 All E.R. 69 (see notes by Miss O. M. Stone, 20 M.L.R. 284 and 640, and a note by Mr. R. E. Megarry, Q.C., 20 M.L.R. 640).

partly concerned? And if it is the object of the new section to enable the court to make a "clean sweep," why then should debts between the spouses be excluded from the ruling of the court designed once and for all to put an end to property and money disputes between them? In the *Camkin* case Wynn-Parry J. may have drawn what was an inevitable conclusion from the *Tunstall* decision of the Court of Appeal (about which all that was required had been said by Mr. Megarry in a note in 69 L.Q.R. 308), but it is very much to be feared that the conclusion may survive the premiss on which it was based.

O. K.-F.

Variation of Trusts Act, 1958

The appeal to the House of Lords in *Chapman* v. *Chapman* [1] was dismissed on March 25, 1954. In January, 1957, the Lord Chancellor invited the Law Reform Committee "to consider whether any alteration is desirable in the powers of the court to sanction a variation in the trusts of a settlement in the interests of beneficiaries under disability and unborn persons, with particular reference to the decision in *Chapman* v. *Chapman*." [2] In November, 1957, the Committee's report [3] was presented to Parliament. Shortly afterwards [4] Mr. Petre Crowder, M.P., presented his Private Member's Bill for the purpose of giving effect to the recommendations made in the Committee's report. The Bill, with amendments, received the Royal Assent on July 23, 1958, and became law as the Variation of Trusts Act, 1958.[5]

This short history is an impressive example of the manner in which Parliament *can* intervene with legislative reform when the courts have made an unsatisfactory decision. Another recent case of speedy legislative intervention was the Recreational Charities Act, 1958,[6] arising out of the decision of the House of Lords in *I. R. C.* v. *Baddeley* [7]; and there have been other encouraging recent examples.[8] The English doctrine of precedent requires the

[1] [1954] A.C. 429; [1954] 1 All E.R. 798. [2] Cmnd. 310.
[3] Law Reform Committee. Sixth Report (Court's Power to Sanction Variation of Trusts). Cmnd. 310.
[4] The Bill, as amended by Standing Committee, was "*Ordered, by* The House of Commons, *to be Printed*, December 18, 1957."
[5] 6 & 7 Eliz. 2, c. 53.
[6] 6 & 7 Eliz. 2, c. 17; noted at (1958) 21 M.L.R. 534.
[7] [1955] A.C. 572; [1955] 1 All E.R. 525.
[8] See, *e.g.*, the Law Reform (Enforcement of Contracts) Act, 1954 (2 & 3 Eliz. 2, c. 34), implementing the recommendations of the Law Reform Committee's First Report (Cmd. 8809: March, 1953); the Law Reform (Limitation of Actions, etc.) Act, 1954 (2 & 3 Eliz. 2, c. 36), founded on the report of Lord Tucker's Committee on the Limitation of Actions (Cmd. 7740: July, 1949); s. 7 of the Agriculture (Miscellaneous Provisions) Act, 1954 (2 & 3 Eliz. 2, c. 39), overruling *Woodward* v. *Earl of Dudley* [1954] 1 W.L.R. 476; the Hotel Proprietors Act, 1956 (4 & 5 Eliz. 2, c. 62), following the Law Reform Committee's Second Report (Cmd. 9161: May, 1954); and the Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2, c. 31), following the Committee's Third Report (Cmd. 9305: November, 1954).

prompt assistance of Parliament whenever the judicial process produces an unacceptable decision which the judges alone are powerless to alter. This assistance has not always been readily available; and what has been achieved in recent years deserves the praise of lawyers.

Chapman v. *Chapman* [9] was concerned with the jurisdiction of the court to sanction on behalf of infants and potential beneficiaries a rearrangement of trusts which involved an alteration in the rights of such persons. The proposed alteration was beneficial: its purpose was to preserve the settled capital by saving a substantial amount of estate duty which would have been payable in due course if the trusts remained unaltered.[10] In the Court of Appeal, Denning L.J.,[11] in a vigorous dissenting judgment, had argued that the courts have a virtually unlimited jurisdiction to remodel trusts by agreeing on behalf of infants and unborn persons to any rearrangement which is advantageous to them. In this argument Lord Denning cited and supported the view of Lord Hardwicke in these words:

> "He [*i.e.*, Lord Hardwicke] proceeded on the broad principle that the court had power to deal with the property and interests of infants, or other persons under disability, in a manner not authorised by the trust *whenever the court was satisfied that what was proposed was most advantageous for them provided, of course, that everyone of full age agreed to it.* I hope to show that that is the true principle today; and for this purpose I will trace the history of the matter for it is supported by the greatest names of English equity." [12]

Lord Denning's views did not prevail. *Chapman* v. *Chapman* seriously restricted the power of the courts to remodel trusts; and although legal ingenuity has been able to distinguish the decision in several types of case, judicial assistance in the remodelling of trusts was much less freely available than it had been, in practice, before the *Chapman* v. *Chapman* decision. The Law Reform Committee considered the situation produced by that decision to be most unsatisfactory. The Committee pointed out that the Court of Protection could sanction any disposition of a patient's property which he might have made himself, including a disposition designed to produce savings of tax or estate duty [13]; that, upon a divorce, the Divorce Court had power to sanction variations in the marriage

[9] [1954] A.C. 429; [1954] 1 All E.R. 798.

[10] In recent years, of course, the most common reasons for seeking to vary trusts have been the desire to avoid unpleasant (and sometimes unforeseen) fiscal consequences; or the feeling that the trusts as originally established have ceased to make economic sense because of inflation and the fall in the value of money.

[11] As he then was.

[12] [1953] Ch. 218 at 269, 270. Italics supplied.

[13] *Re C. W. M.* [1951] 2 K.B. 714.

settlement designed to achieve the same purpose [14]; and the Committee asked—

> "Why should an infant whose parents are happily married be in a worse position than a lunatic, or an infant whose parents are divorced? Why should an infant who is interested in land be better off than one interested in personalty? Why should it not be possible to arrange the affairs of all infants to their best advantage? Why should anyone be prevented from arranging his affairs to his best advantage by reason of some potential beneficiary who (if he ever acquires an interest) would be equally benefited by the arrangement?" [15]

The Variation of Trusts Act, 1958, now enables the courts to exercise a jurisdiction of approximately the same unlimited extent as that for which Lord Denning argued in vain in the *Chapman* v. *Chapman* case. Section 1 (1) gives the court power to approve "any arrangement . . . varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts" on behalf of the following four classes of beneficiaries or potential beneficiaries:

(i) beneficiaries who by reason of infancy or other incapacity are incapable of assenting;
(ii) persons, whether ascertained or not, who may become beneficiaries in the future if they then answer a specified description or qualify as members of a specified class;
(iii) persons unborn;
(iv) persons who will be interested as discretionary beneficiaries under protective trusts if the interest of the principal beneficiary should fail or determine.

The court may not approve an arrangement on behalf of any person in classes (i), (ii) and (iii) unless the arrangement is for that person's benefit [16]; but this restriction does not apply to the case of persons in class (iv), whose interest can be disregarded. The jurisdiction conferred by the Act is exercisable by the High Court (s. 1 (3)), and will usually be exercised in proceedings commenced by originating summons in the Chancery Division [17]; but the question whether there is benefit for a beneficiary of unsound mind is to be determined by the Court of Protection in any case where a committee or receiver of that beneficiary's estate or income has been appointed (s. 1 (3)).

The Law Reform Committee suggested that it was for consideration whether the power of the court should be exercisable so as to break an entail made perpetual by statute, and that it

[14] *Thomson* v. *Thomson* [1954] P. 384.
[15] Cmnd. 310 at p. 6.
[16] Proviso to s. 1 (1).
[17] And, if the settlor is alive at the date of any application to the court, he should usually be made a respondent to the summons: see R.S.C. (No. 2) 1958, r. 9.

might be thought desirable to make provision for this "one way or the other" in any legislation on this subject.[18] But section 1 (5) of the new Act provides that the Act shall not apply to trusts affecting property settled by Act of Parliament. It will continue to be necessary to go to Parliament to break any subsisting parliamentary entails.[19]

Some lawyers and others may regret that the jurisdiction conferred by the new Act provides "tax planners" with a new means of achieving their purpose of saving tax and estate duty for their clients. These critics will remember Lord Morton's fear, expressed in *Chapman* v. *Chapman*, that there might develop "a most undignified game of chess between the Chancery Division and the legislature"[20] if the courts were allowed an unlimited jurisdiction to remodel trusts. But all who admired Lord Denning's dissenting judgment in *Chapman* v. *Chapman*, and even those who disagreed with him, will surely welcome the disappearance of the anomalies discussed in the Law Reform Committee's Third Report and the absurd, hair-splitting technicalities of the limited jurisdiction to remodel trusts which survived *Chapman* v. *Chapman*; and this writer, at least, believes that there will be no "undignified game of chess."

LEOLIN PRICE.

THE LANDLORD AND TENANT (TEMPORARY PROVISIONS) ACT, 1958

THE Rent Act, 1957, gave to a tenant whose house was decontrolled by reason of its rateable value a breathing space of fifteen months which came to an end on October 6, 1958. That was the earliest date upon which the six-months' notice terminating his right of occupation could take effect. During that period he retained security of tenure and if the landlord wanted to put up his rent he had to offer him a three-year lease. There was no obligation put upon landlords to offer such a lease although from time to time the Minister of Housing and Local Government belaboured those who did not do so. In the result some tenants accepted three-year leases which by all accounts were usually on reasonable terms but sometimes were very onerous indeed. Others bought the house in which they were living or another house or moved out to relatives. But there remained a considerable hard core of tenants who had not been offered leases by their landlords and who faced eviction on October 6 without having been able to make any alternative arrangements. To these at the eleventh hour the Landlord and Tenant (Temporary Provisions) Act, 1958, has brought some further relief.

[18] Cmnd. 310 at p. 9.

[19] Readers will remember a recent unsuccessful attempt to break, by private legislation, the parliamentary entail affecting the Duke of Norfolk's settled estates.

[20] [1954] A.C. 429 at 468.

The Act prohibits eviction without a court order either by direct means or by cutting off essential services. It should be noted, however, that this only applies where the dwelling-house is decontrolled by reason of rateable value. Where a new tenancy has been granted since July 6, 1957, the landlord, after terminating the tenancy by a proper notice to quit, can resort to self-help to remove the tenant to the same extent as he could before the Rent Acts were thought of.

The protection of the Act is only given to a tenant of decontrolled property while he remains in occupation or to a member of his family who remains in possession after his death. The tenant who comes within the Act can obtain a suspension of execution of an order for possession up to nine months in the first place and thereafter for further periods of up to six months at a time until August 18, 1961. The matters which he must show in order to obtain this benefit are not unreasonable. If the landlord has offered a three-year lease he must not have unreasonably refused it having regard to his means among other things. He must have tried by all reasonable means to find other "appropriate" accommodation. He must have paid or tendered the proper rent since his notice ran out (that is, twice the 1956 gross value together with rates and a reasonable sum for any furniture and services). But if he failed to do so, perhaps through ignorance of the Act, the court can still give him relief conditional on his paying it within twenty-eight days. Lastly, he must show greater hardship. While the suspension lasts he must pay whatever rent the landlord asks provided that it is within the combined means of himself and any member of his family living with him who might be expected to contribute. If the landlord had before April 2, 1958, agreed to sell the house to an intending occupier the tenant cannot obtain suspension beyond the completion date.

The new Act has certainly prevented a spate of evictions and many landlords no doubt prefer to accept the increased rent rather than face eviction proceedings where so much is in the discretion of the court. It is early yet to judge the social effects of the first slice of decontrol. On the surface there has been very little disturbance. But it is possible that a class that is already hard pressed has accepted further heavy burdens rather than face the upheaval of seeking new premises where there would be no security of tenure. If so, one of the objects of the Rent Act, 1957, to redistribute families into houses suited to their needs, will have been defeated. There is no relief for those who hastily accepted unduly onerous leases at a time when the scales were heavily weighted in favour of the landlord. And one may legitimately ask whether a great deal of anxiety, hardship and even injustice might not have been avoided if the provisions of the new Act had been included in the 1957 Act in the first place.

John Montgomerie

DIVORCE (INSANITY AND DESERTION) ACT, 1958

THE Divorce (Insanity and Desertion) Act, 1958,[1] which brings into effect some recommendations of the Royal Commission on Marriage and Divorce,[2] tidies up some anomalies in the field of matrimonial causes: (i) by widening the definition of incurable unsoundness of mind (or insanity in Scotland) as a ground for divorce[3] and (ii) by alleviating hardships resulting from the introduction of desertion as a ground for divorce[3] after 1937.

Relaxation in the definition of insanity as a ground for divorce is (once the ground is accepted on principle) a necessary corollary of the more liberal approach recently adopted to treatment for mental illness. When those suffering from mental disorders are encouraged to seek treatment as voluntary patients, and certification is regarded as "the very last step in the course of treatment for mental illness to be taken only when it is imperative for the patient's own welfare or the public safety"[4] it is reasonable that the fact that treatment has been voluntarily received for part or the whole of the necessary period should not bar relief for the other spouse. When mental patients are no longer segregated exclusively into mental hospitals, but may be treated in the psychiatric ward of general hospitals, or in special neurosis hospitals, or in an annexe of certain mental hospitals, it is reasonable that the other spouse should not be debarred from relief because of the place in which the treatment was received. It is also reasonable that relief should not be refused because the other spouse has been treated abroad, and not within the United Kingdom, the Isle of Man, or the Channel Islands. Finally, it is not reasonable that short gaps in the period of treatment, even of the most technical character, such as failure to comply with some formality,[5] should bar relief to the other spouse.

The Royal Commission on Marriage and Divorce recommended amendments to the law in all these respects and, accordingly, the new Act now makes the following provisions:

(i) Voluntary treatment for five years as a mental patient enables the other spouse to obtain relief. For England, the

[1] This Act received the Royal Assent on July 23, 1958, and unlike some other Acts in the same field passed at about the same time, it came into immediate operation.

[2] The Report is Cmd. 9678.

[3] Or judicial separation, see Matrimonial Causes Act, 1950, s. 14. Since institutional treatment for five years is still required, there is presumably no danger that insanity of the petitioner may be raised as a defence to a plea for restitution of conjugal rights.

[4] The description adopted by the Royal Commission on Marriage and Divorce, Cmd. 9678, para. 177.

[5] As in *Charlton* v. *Charlton* [1955] 1 W.L.R. 675, C.A.

relevant part of the Matrimonial Causes Act, 1950, now reads as follows, the words in brackets having been repealed [6]:

> Section 1 (2). For the purposes of this section a person of unsouud mind shall be deemed to be under care and treatment . . .
>
> (*d*) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, or under any such law as is mentioned in paragraph (*c*) of this subsection, (*being treatment which follows without any interval a period during which he was detained as mentioned in paragraph* (*a*), *paragraph* (*b*) *or paragraph* (*c*) *of this subsection*) and not otherwise.

For Scotland, the exclusion of treatment as a voluntary patient in the Divorce (Scotland) Act, 1938, s. 6 (3) (*b*), is likewise repealed.

(ii) Care and treatment "as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands" is sufficient care and treatment for the purposes of both the Matrimonial Causes Act, 1950, s. 1 (2), and the Divorce (Scotland) Act, 1938, s. 6 (3).[7]

(iii) Care and treatment as a resident in a hospital or other institution in any other country likewise comes within the provisions of the Matrimonial Causes Act, 1950, s. 1 (2), and the Divorce (Scotland) Act, 1938, s. 6 (3), provided the treatment received by the respondent is comparable with that in the relevant hospitals or institutions in the United Kingdom, the Isle of Man, or the Channel Islands.[8]

For the purposes of both (ii) and (iii) above, a certificate from the Admiralty or a Secretary of State is to be conclusive as to the fact and the period of treatment in any hospital under the direction of the Admiralty, the Army Council or the Air Council.[9] The legislature has, however, left to the judges what may well prove the difficult task of deciding what treatment received abroad is comparable with that obtainable in England.

The incurability of the respondent and the fact of continuous care and treatment for at least five years immediately preceding the presentation of the petition must still be shown, but:

(iv) The interruption of care and treatment for any period of less than twenty-eight days is to be disregarded.[10] This will obviate the difficulties that arose in such cases as *Frank* v. *Frank*,[11]

[6] By the Divorce (Insanity and Desertion) Act, 1958, s. 4 (3).
[7] *Ibid.*, s. 1 (1) (*a*). [8] *Ibid.*, s. 1 (1) (*b*).
[9] *Ibid.*, s. 1 (2).
[10] *Ibid.*, s. 1 (3).
[11] [1951] P. 430, where the Court of Appeal fortunately reversed a finding at first instance that care and treatment had been sufficiently interrupted during transfer of the patient from England to Scotland and again to England for the petitioner to be debarred from relief.

Safford v. *Safford*,[12] and *Swymer* v. *Swymer*.[13] The new provisions, coupled with the first provision enumerated above, will ensure that a petitioner will not in future be denied relief, as in *Charlton* v. *Charlton*,[14] because he has taken time to persuade the respondent to undergo voluntary treatment on discharge from temporary detention, instead of taking immediate steps to have her certified.

In the realm of desertion, another clause in the new Act [15] provides, as recommended by the Royal Commission on Marriage and Divorce,[16] that once desertion has been shown, the court may regard the desertion as continuing even if the deserting party is incapable of continuing the intention to remain in desertion, provided the evidence is such that the court would have inferred the continuance of the intention had there been no incapacity. This goes further in the direction of eliminating supervening insanity as a defence to a charge of desertion than the House of Lords felt justified in going in *Crowther* v. *Crowther*,[17] where the majority (Lord Oaksey dissenting) laid down that the petitioner must prove a continued intention to desert when insanity supervenes otherwise than by evidence of intention displayed before and after the certification. Before this decision, the rule had been [18] that unsoundness of mind automatically terminated the intention to desert of the affected party.

The opportunity has not been taken in the present Act, however, of providing that, as also recommended by the Royal Commission on Marriage and Divorce, insanity should cease to be a defence to the initial act of separation,[19] or to a charge of cruelty.[20]

Finally, the present Act implements the recommendation of the Royal Commission on Marriage and Divorce [21] that in those cases, necessarily few by now, in which married persons entered into a separation agreement as the result of desertion, before desertion became a ground of divorce,[22] the court may disregard

12 [1944] 1 All E.R. 704, where the Court of Appeal similarly overruled a finding at first instance by Lord Merriman P. that short leave on licence sufficiently interrupted the continuity of treatment to debar the petitioner from relief.

13 [1955] P. 11, where the Court of Appeal had again to reverse a finding at first instance that the continuity of treatment was sufficiently interrupted by the transfer of the patient to a general hospital for treatment of a fractured limb.

14 [1955] 1 W.L.R. 675, C.A.

15 s. 2.

16 Cmd. 9678, para. 260.

17 [1951] A.C. 723.

18 *Williams* v. *Williams* [1939] P. 365.

19 Cmd. 9678, para. 261.

20 *Ibid.*, para. 256. The present position that insanity may be a good defence to a charge of cruelty was established by the Court of Appeal in *Swan* v. *Swan* [1953] P. 258 and *Palmer* v. *Palmer* [1954] 3 W.L.R. 756.

21 Cmd. 9678, para. 158.

22 *viz.*, January 1, 1938, under the Matrimonial Causes Act, 1937, s. 2, amending the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176.

the separation agreement for the purposes of a petition for divorce based on desertion, if the respondent had deserted the petitioner before the separation agreement was made, or the court is satisfied that but for the agreement the respondent would have been held to have deserted the petitioner.

O. M. Stone.

REPORTS OF COMMITTEES

Fourth Report of the Private International Law Committee (Formal Validity of Wills)

For nearly a century writers on the conflict of laws in England and elsewhere have been plagued by the incongruities and ambiguities of the Wills Act, 1861 (Lord Kingsdown's Act). The news that the Private International Law Committee in their Fourth Report [1] propose its radical amendment is therefore to be welcomed.

As is well known, the Act was passed to remove the hardships which resulted from *Bremer* v. *Freeman*,[2] where it was held that, since wills of movables must comply with the formalities prescribed by the law of the testator's last domicile, the will of a British subject domiciled (in the English sense) in France was void for non-compliance with French formalities. It is obvious now what the statute ought to have provided. It ought to have provided in general terms that any will of movables should be formally valid if it complied with the formalities prescribed by the law of the place of execution, or by the law of the testator's domicile at the date of execution, or by the law of the testator's domicile at the date of his death. Unfortunately, sections 1 and 2 contain three major errors: (1) they are confined to the wills of British subjects, though the mischief to be cured was not confined to them; (2) they differentiate between wills made inside and outside the United Kingdom, allowing a wider choice of forms for the latter than for the former; and (3) they are based on the domestic law distinction between realty and personalty and not on the conflict of laws distinction between movables and immovables. Moreover, section 3 is drafted in such vague terms that no two writers are agreed on its meaning.

The Committee recommend that sections 1 and 2 of the Act should be replaced by legislation dealing with all wills wherever made, whether made by British subjects or not, and whether disposing of land or movables. A will should be formally valid if it complies with the formal requirements of the internal law of any of the following: (a) the place where the will was made; (b) the place where the testator was domiciled at the time of making the will or of death; (c) any country of which the testator was a national at the time of making the will or of death; (d) in so far

[1] Cmnd. 491. The Committee's First Report, which dealt with the law of domicile, was published in February, 1954 (Cmd. 9068). The Committee's Second and Third Reports, dealing respectively with international sales of goods and with the recognition and enforcement of foreign arbitral awards, have (unaccountably) not been published.

[2] (1857) 10 Moo.P.C. 306.

as the will disposes of land, the place where the land is situated (para. 11 (a)).

The following comments are submitted.

(1) As a practical matter the proposal that the same formalities should suffice for wills of land and wills of movables (except that those of the *lex situs* are allowed in addition for wills of land) is to be welcomed. But it may be doubted whether the Committee are correct in their view (para. 4 (a)) that "the application of the *lex situs* to wills of land in England is the historical result of the common law concept of heirship," and that with the abolition of descent to the heir in 1925, the reason for it has disappeared. What reason is there for supposing that a conflict rule for wills of land was evolved from a domestic rule that one form of property in land, namely real estate, descended to the heir if no will was made? And how does the Committee's reason account for the fact that, apart from Lord Kingsdown's Act, wills of leaseholds must comply with the formalities of the *lex situs*, or for the fact that the *lex situs* rule is to be found in many countries which have never known the English concept of heirship? The truth surely is that the *lex situs* rule is not, like the rule in *Shelley's Case*, part of the *mystique* of heirship at common law, but a rule of obvious practical convenience. It does not follow, however, that the formalities of the *lex situs* should be obligatory for wills of land.

(2) The proposal that the formalities of the place where the will was made or where the testator was domiciled at the time of making the will or of death should suffice repeats the existing common law rule as supplemented by sections 1 and 2 of Lord Kingsdown's Act, except that (a) the common law rule is confined to wills of movables and the sections to wills of personal estate, and (b) the formalities of the testator's domicile at the time of making the will do not now suffice for wills made within the United Kingdom, though they do for wills made outside the United Kingdom. The removal of these anomalies is welcome.

(3) The proposal that the formalities of the testator's country of nationality should be an available choice is a startling one, especially as the Committee criticise the limitation of the Wills Act, 1861, to wills of British subjects on the grounds that this is a departure from the general common law principle and that it has become increasingly difficult to apply in view of the increasing complexity of the concept of British nationality (para. 4 (c) (i)). The test of nationality, expelled by the Committee by the back door, returns through the front in a more general (though facultative) form. The Committee add two qualifications to their proposal, which they admit is not yet a very firm or precise one. (a) Where it is doubtful, as in the case of a citizen of the United Kingdom and Colonies or of a federal State, which is the law of a testator's nationality, "his choice should be limited so as to prevent reliance

on a quite inappropriate legal system." (b) Where the testator's personal law is the law of his domicile (as it is in the case of citizens of the United Kingdom and Colonies, of the Commonwealth of Australia, or of the United States, etc.), the law of his nationality should not be available unless (i) the will is made outside the United Kingdom and Colonies or the federation in question, and (ii) the testator is not at that time domiciled therein. These qualifications will involve complicated drafting and one fears that the result may be even more incongruous than Lord Kingsdown's Act itself. It is to be hoped that the whole of this nationality proposal will be dropped because it is out of harmony with common law principles of the conflict of laws. It is to be observed that neither the Ontario Wills Amendment Act, 1954, nor the United States Model Execution of Wills Act, 1940 (which the Committee more than once refer to with approval), contains any reference to the law of the nationality.

(4) The formalities of the testator's domicile of origin, now permitted by section 1 of Lord Kingsdown's Act for wills made outside the United Kingdom (but only if the domicile of origin is within Her Majesty's dominions), have been rightly abandoned. No special significance attaches to the domicile of origin according to modern ideas.

(5) The Committee's emphasis on the internal law of their four alternative choices implies disapproval of *In bonis Lacroix*,[3] where it was held that a renvoi could be accepted from the conflict rules of the *lex loci actus* which was the appropriate law under section 1 of Lord Kingsdown's Act. But they do not propose that wills already executed in reliance on that decision should be safeguarded by a transitional provision (as they do for wills already executed in accordance with the testator's domicile of origin).

Two further recommendations require notice.

(a) It is proposed that the new statute should apply to the formal validity of the exercise by will of powers of appointment (one hopes that the draftsman will remember to deal with special powers created before, but exercised after, the new Act comes into force); but that in addition a power should be validly exercised as to form if the appointment complies with the formalities prescribed by the law governing the instrument of creation. This has already been held to be the law in the line of cases culminating in *Murphy* v. *Deichler*[4]; and though it is true that in each of them the instrument of creation was governed by English (or Irish) law, it is a surprise to be told (para. 11 (*c*)) that this has "hitherto been generally regarded as a rule of internal English law."

(b) In a proposal on the law which should govern the revocation of wills, the Committee state (para. 11 (*f*)) that "the revocation

[3] (1877) 2 P.D. 94.
[4] [1909] A.C. 446.

of a will can occur (1) as the result of a second will made by the testator, (2) as the direct result of the testator's act, such as destruction or deletion, or (3) as the incidental result of some act done by the testator having a different immediate purpose (*e.g.*, marriage, divorce, etc.)." They state that the first case has already been dealt with in their proposals for the formal validity of wills, that the third is outside their terms of reference (which are limited to the formal validity of wills), and in the second case they recommend that a purported revocation should be accepted if it complies with the requirements of any law which under their proposals could govern the formal validity of a will, had the testator chosen to make one at that moment. They might perhaps have added that their first case could be subdivided into two, namely (i) where a second will expressly revokes the first, and (ii) where a second will impliedly revokes the first by reason of inconsistent dispositions. Revocation in the latter case would appear to be a question of construction, and hence outside the Committee's terms of reference. It is disconcerting to find that there is no express recommendation to repeal section 3 of the Wills Act, 1861, that *enfant terrible* of the English conflict of laws.

In conclusion, the Committee recommend that (a) other Commonwealth countries should be invited to consider their proposals; (b) that the proposals, with or without modifications suggested by the observations of those countries, should be brought before the next Hague Conference on Private International Law; and (c) that after the conclusion of that Conference, legislation be introduced in this country to give effect to such of their proposals as then appear acceptable. Thus, in the interests of an unattainable uniformity, a long overdue reform of the English rules of the conflict of laws is to be postponed until the Greek kalends. The Ontario Wills Amendment Act, 1954, was the result of a quarter of a century of effort by the Conference of Commissioners on Uniformity of Legislation in Canada to improve on the original Lord Kingsdown's Act.[5] It does not seem likely that the Canadian Government will regard the Committee's proposals as an improvement on the product of their own Commissioners.

J. H. C. Morris.

[5] See Falconbridge, *Essays on the Conflict of Laws* (2nd ed.), pp. 546–551, xxxi–xxxii.

NOTES OF CASES

Attacking the Colour Bar—A Lawful Purpose

In his speech in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*,[1] Lord Wright distinguished a lawful combination from an unlawful conspiracy by contrasting "the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any just cause." In the words of Lord Simon [2] a combination is not unlawful if the "real and predominant purpose" of those combining is to advance their "lawful interests." The *Crofter* decision—and this is one of its cardinal features—defined "lawful interests" in terms which went beyond "trade combination," and included such typical trade union interests as the strengthening of collective bargaining machinery and complete union organisation of an industry. In other words, it extended the principle of *Mogul Steamship Co.* v. *McGregor Gow & Co.*[3] from the concerted action of traders to the concerted action of workers. "A combination," however, "to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation" [4] may be a conspiracy. The line which separates lawful from unlawful action does not run between the markets of commodities or services and the labour market, but between a "policy of interest" and a "policy of prestige." The latter may, as Lord Maugham said,[5] include an expression of "a dislike of the religious views or the politics or the race or the colour" of another person. An actual example of "prestige policy" is afforded by *Huntley* v. *Thornton*.[6]

In *Scala Ballroom (Wolverhampton), Ltd.* v. *Ratcliffe and Others*,[7] the plaintiffs, who were the proprietors of a dance hall, decided and announced that they would deny admittance to coloured people, but they did not bar coloured musicians from the orchestra. The defendants were officials of the Musicians' Union. On behalf of the union they informed the plaintiffs that its "long-established policy" was "strongly opposed to discrimination of any kind, including, of course, racial discrimination" and that as long as the plaintiffs continued to ban coloured persons from their ballroom, members of the union would be instructed not to perform

1 [1942] A.C. 435 at p. 469.
2 At p. 446.
3 [1892] A.C. 25.
4 *Per* Lord Simon at p. 445.
5 At p. 451.
6 [1957] 1 W.L.R. 321; [1957] 1 All E.R. 234 (see Note by C. Grunfeld, 20 M.L.R. 495).
7 [1958] 1 W.L.R. 1057; [1958] 3 All E.R. 220.

there. The plaintiffs thereupon obtained from Havers J. an interlocutory injunction restraining the defendants from procuring or attempting to procure any union member to break any contract to perform at the Scala Ballroom, and from this there was no appeal, so that the effect of section 3 of the Trade Disputes Act, 1906, on this situation remained undecided. It is, to say the least, not unarguable that, in so far as the action taken by the union officials involved an inducement to break existing contracts, it was covered by that section in that it was done " in contemplation or furtherance of a trade dispute " and the contracts of the union members were contracts of employment. This question was, however, outside the proceedings which led to the decision of the Court of Appeal here under review.

The plaintiffs also issued a writ for damages for conspiracy and claimed, by reason of conspiracy, an injunction restraining the defendants from persuading or attempting to persuade any union member not to perform at the dance hall. Diplock J. refused to grant this injunction, and the plaintiffs' appeal against this decision was dismissed by the Court of Appeal (Hodson, Morris and Sellers L.JJ.). The learned judge as well as the three members of the Court of Appeal took the view that what the defendants had done did not, in the light of the law as laid down in the *Crofter* case, constitute an actionable conspiracy at common law. Much as one may welcome this conclusion, it is regrettable that the effect of the Trade Disputes Act, 1906—the relevant section on this issue would have been section 1—remained undetermined. Hodson L.J. said that this matter had been raised but not argued and he expressed no opinion. Where a question can be answered either on the basis of an analysis of a common law rule or as a matter of statutory interpretation, lawyers trained in the common law will instinctively choose the former alternative although the latter route may be shorter and easier.

It must of course be remembered that extravagant conclusions may not be drawn from a decision rendered on an application for an injunction. As Hodson L.J. said, it is " a provisional decision," and " it would be wrong to attempt to lay down in detail the law which is relevant to this case." Moreover, the defendants had argued (and convinced the court) that material interests of union members were involved in view of the intolerable position in which coloured musicians would find themselves if they were compelled to " insulate themselves from their audience." On this reasoning the case was within the *Crofter* definition of a " lawful interest " justifying a " conspiracy " because the union was defending an interest of some of its members to be able to work in a particular employment. Neither Diplock J., however, nor the members of the Court of Appeal allowed their decisions to rest on this narrow ground.

The gist of the case is that "interests," "purposes" or "objects" may be lawful within the *Crofter* definition although they cannot be translated into cash. This was emphasised by Hodson L.J. The enforcement of a policy of non-discrimination between races is, quite apart from any material or selfish interests, in itself a legitimate purpose. "If the defendants honestly believe that a certain policy is desirable, and if they honestly believe that it is the wish of their members that such a policy should prevail, and that there should be no colour bar discrimination, it can be said that the welfare of the members is being advanced, even though it cannot be positively translated into or shown to be reflected in detailed financial terms." [8]

There is clearly a world of difference between enforcing a policy of non-discrimination and—the situation in Lord Maugham's hypothetical example above—an expression of a dislike of the political views or the race or colour of an individual.

How far the principle underlying this case could be applied to "political" strikes is not an easy question to answer. Where the strike is directed against an employer in view of the character of the work done in his undertaking (*e.g.*, refusal on the part of dockers to load cargoes intended for the support of warlike action taken by an unpopular foreign government) the situation may be comparable. Where on the other hand the "policy" pursued is quite unconnected with the particular employment, as, *e.g.*, a demonstration against some aspect of the policy of the British Government, it may be considered very different. The problem of the "political" strike remains as open after this decision as it was before.

In any event, the attitude of any person, lawyer or non-lawyer, towards a decision of this kind, cannot fail to be influenced by the nature of the "policy" in question. This influence may operate above or below the level of consciousness; it is always there. The present writer confesses that he is in sympathy with the policy of the union and out of sympathy with the action taken by the plaintiffs. He welcomes the decision of the court, but he might have felt differently about a similar decision rendered in favour of trade union officials seeking to enforce rather than to combat a colour bar. It would be sheer hypocrisy to assert the contrary.

O. K.-F.

THE MASTER'S INDEMNITY—VARIATIONS ON A THEME

ALTHOUGH the defendants in *Harvey* v. *O'Dell, Ltd.* (*Galway Third Party*),[1] contended, with "an elaborate citation of authorities," that they were not liable to the plaintiff, and McNair J.

[8] *Per* Morris L.J. [1958] 1 W.L.R. at p. 1062.
[1] [1958] 1 Q.B. 78, also reported [1958] 1 All E.R. 657.

spent some time on this part of the case, it is in the third party proceedings brought by the defendants that the main interest lies, and it is only with those proceedings that the present note is concerned.

The facts, so far as material, may be stated as follows. The plaintiff and one Galway were both in the employment of the defendants, the latter in the capacity of storekeeper. On February 29, 1952, the plaintiff and Galway were travelling in Galway's motor-cycle combination when they were involved in an accident in which the plaintiff was injured and Galway killed. The accident was partly the result of Galway's negligence, and accordingly the plaintiff brought his action against the defendants as Galway's employers, alleging that, at the time of the accident, Galway was acting within the course of his employment. This point was resolved in the plaintiff's favour, and the defendants were therefore liable to him for Galway's negligence. The third party proceedings were brought by the defendants against Mrs. Galway, Galway's widow and administratrix, to recover from Galway's estate the damages for which they had been held liable.

The defendants put their case against the third party in two ways. First they maintained that, by the combined operation of the Law Reform (Married Women and Tortfeasors) Act, 1935,[2] and the Law Reform (Miscellaneous Provisions) Act, 1934,[3] the third party was liable to pay contribution and that this contribution should amount to a complete indemnity. Secondly they claimed that the principle of *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*,[4] covered the present case and that they were therefore entitled to damages for a breach by Galway of the implied term in his contract of service that he would exercise reasonable care. It is proposed to deal here with the argument founded upon *Lister's* case, leaving the points under the statutes for discussion in a later note.

The gist of the defendants' argument was that *Lister's* case produced the result that an employer is entitled to recover over against his servant in all cases in which the employer has been held liable for damage negligently caused by the servant in the course of his employment. There is an implied term in the contract of employment whereby the servant undertakes to exercise reasonable care and this extends to all acts falling within the course of the servant's employment. The third party, on the other hand, contended that the implied term extended no further than those acts which the servant is actually employed to do. Since Galway was employed as a storekeeper and not as a driver, there could, in his case, be no implied term that he would drive with reasonable care, even though he was driving in the course of his employment.

[2] 25 & 26 Geo. 5, c. 30.
[3] 24 & 25 Geo. 5, c. 41.
[4] [1957] A.C. 555.

McNair J. decided this issue in favour of the third party and held that *Lister's* case was limited in the sense for which she contended. "I do not read *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*, as laying down a proposition of general application that, whenever an employed person drives a motor-vehicle in the course of his employment, he impliedly agrees *vis-à-vis* his employer to take reasonable care in such driving and to indemnify him for any failure."

Lister's case was distinguished, therefore, and McNair J. claimed to find authority for the distinction in the actual speeches delivered in the House of Lords in *Lister's* case. He found "plain indications" that the House of Lords was dealing only with "the normal engagement of a servant to drive a lorry or other vehicle on the road," and referred to short passages in the speeches of Viscount Simonds and Lords Morton, Tucker and Somervell.[5]

It is submitted, with respect, that whether or not the distinction taken by McNair J. is correct, no direct authority for it is to be found in the speeches of the House of Lords. At best the House must be regarded as having left the matter open, for the passages cited by McNair J. are inconclusive and can be matched with passages at least as persuasive in the opposite sense. For example, McNair J. cites these words from the speech of Viscount Simonds [6]: "Nor was it suggested that in the present case there were any features which distinguished the relation of the appellant and respondents from that of any other driver and his employer." Yet Viscount Simonds also said, "the appellant was under a contractual obligation *in the performance of his duty*." [7] Lord Radcliffe, whose speech was not referred to by McNair J. said,[8] "If the contract of employment is viewed as a general legal relationship in which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him 'with all faults' and that the employee does not by virtue of his engagement impliedly undertake to use all reasonable care in the conduct of his employer's affairs." Is there any reason to suppose that Lord Radcliffe considered the words "conduct of his employer's affairs" as having a meaning any different from "course of his employment"?

There is no need to elaborate citations from *Lister's* case for the truth would seem to be that the point considered in *Harvey* v. *O'Dell* was not present in the minds of any member of the House of Lords in *Lister's* case and that none of them intended to lay down a rule one way or the other. The problem should be considered as *res integra*.

In *Lamb* v. *Lady Elizabeth Palk* [9] the defendant's coachman, while driving his mistress' carriage and pair, found his way blocked

[5] [1957] A.C. at pp. 576, 580, 592, 598.
[6] At p. 576.
[7] At p. 573. Italics supplied.
[8] At p. 586.
[9] (1840) 9 Car. & P. 629.

by the plaintiff's van and gig which were parked outside the plaintiff's premises. After waiting about five minutes for the van to be moved the coachman became impatient and got off his box in order to move the van himself and in doing so caused damage to property belonging to the plaintiff. Gurney B., "having consulted with the other learned Barons who were sitting in the Exchequer," held that the coachman "was not acting in the employ of his mistress at the time that this matter occurred." No reasons are given for the decision, but it seems reasonably clear that Gurney B. was relying upon a supposed distinction between acts which the coachman was actually employed to do and other acts connected with the employment but not forming part of what the servant was actually employed to do. This distinction, if it ever really existed, was rejected at the latest by 1866 when *Lamb* v. *Palk* was overruled by *Page* v. *Defries*.[10] Today the distinction is wholly irrelevant in "course of employment" cases and was, as it happens, quite recently disapproved by Finnemore J. in a strong case for its application.[11]

Is there, then, any reason for the reintroduction of the distinction in cases where the employer seeks to recover over against his servant the damages for which the servant's negligence has made him liable? McNair J. said that he found it "difficult to see on what grounds of justice or reason I should hold that, by making his motor-cycle combination available for his employers' business on a particular occasion, he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence." As *Lister's* case itself shows, however, it is unnecessary, to enable the employer to succeed, to imply so unrealistic a term into the contract of service as an undertaking to indemnify. All that is required is the implied promise to exercise reasonable care. The rest follows as damages for breach of that promise.

It may be said that this is a technical point devoid of merit, but it is suggested that it is actually both reasonable and just that in such cases as the present the employer should be entitled to recover. The distinction taken by McNair J. seems to be applicable in two distinct kinds of case. It covers cases such as the present where it can be argued that the servant has done his employer a favour by making use of his own property for the purposes of the employer's business. It also covers the case where a servant does something for his own purposes but which is not so far removed from his employment as to fall outside the course of employment. In the latter kind of case the argument based upon reason and justice seems to point even more cogently than in *Lister's* case itself to the desirability of allowing the employer's claim. In the former type of case however McNair J.'s distinction is at first sight

[10] (1866) 7 B. & S. 137.
[11] *Staton* v. *National Coal Board* [1957] 1 W.L.R. 893.

attractive. The servant has done his employer a favour. It is therefore unjust that he should become involved in liability.

It is suggested that this attractive appearance is deceptive, at least in the most common kind of case where the property used by the servant for his employer's business is a motor-vehicle belonging to the servant. It will be recalled that in *Lister's* case all the members of the House of Lords agreed that Lister owed his employers a contractual duty of care. The difference of opinion which led to the final division concerned the effect of insurance upon the ultimate result of the case. Since the employers in that case were covered by insurance against the particular risk involved, did not this lead to the result that they could not recover? The majority held that the insurance factor was irrelevant while the dissenting Lords of Appeal took the view that since the employers were insured, their claim was answered by an implied term to the effect that they would not sue.

The division of opinion in the House of Lords in *Lister's* case is probably to be interpreted as the result of a conflict between the classical common law policy of individual responsibility and the currently popular theory of the distribution of risk. The majority adhered to the view that the person who actually caused the damage should be the person ultimately liable for it in law, while the minority preferred to allow the loss to remain upon the shoulders of the person best able to distribute it by insurance.

With great respect, the decision of McNair J. on this part of the case succeeds in defeating both policies. Not only does it exonerate the person who actually caused the damage, but it also exonerates the person best able to distribute the loss by insurance. It is true that the insurance position is not stated in the report, but it is safe to assume that Galway, as the owner of the motor-cycle combination, must have been the holder of a policy of insurance in accordance with the Road Traffic Act [12] and may well have been the holder of a comprehensive policy. Even if he had not insured in such a way as to cover his passengers, he could easily have done so. In view of the fact that the victim of Galway's negligence was also an employee of the defendants it may be that they too were covered in the circumstances of the actual case, but had the victim been a casual passer-by it is unlikely that they would have been covered, while it is certain that Galway would have been covered.[13] Whichever policy is preferred, therefore, the decision is unfortunate.

One of the reasons given by McNair J. for his decision was that it cannot be the law that an employer is entitled to recover against a servant who has been guilty of negligence while performing, in time of emergency, some act well outside the normal scope of his

[12] 20 & 21 Geo. 5, c. 43, s. 35.

[13] The minimum required by the Act is cover against third party risks. This does not include passengers carried free (s. 36).

duties. If, for example, "in a time of labour disturbances in the docks master stevedores, as sometimes happens, induce their office staff to man the cranes or to do stevedoring (and) if a third party is injured through the negligence of such staff, no doubt the master stevedores would be vicariously liable, as, indeed, they might be primarily liable, on the basis that they had employed unskilled persons. But it would surely be contrary to all reason and justice to hold that the willing office staff, by abandoning their ledgers and undertaking manual tasks, had impliedly agreed to indemnify their employers against liability arising from their negligence in performing work which they were not employed to do." [14]

One may readily agree with McNair J. that in such circumstances the employer cannot recover against his servant, but this need present no difficulty to the acceptance of the view contended for by the defendants, that the principle of *Lister's* case is generally applicable to all damage caused by a servant in the course of his employment. McNair J. himself suggested one answer when he pointed out that the employers might be primarily liable, but even if that answer is for some reason unacceptable the solution to McNair J.'s hypothetical case is not hard to find. In the circumstances he supposes it is surely right that the employer impliedly undertakes to indemnify his servant against any liability the servant himself may incur through the performance of work to which he is so unaccustomed. Such an undertaking would prevent the employer from maintaining any action against his servant.

There is, therefore, no valid reason for the restriction of *Lister's* case to cases in which the damage was caused by a servant doing only that which he was actually employed to do. It is to be hoped that this part of McNair J.'s decision will not be followed.

J. A. Jolowicz.

Rescission of a Contract of Sale of Goods

The case of *Long* v. *Lloyd*,[1] noted by Mr. Grunfeld in 21 M.L.R. p. 550, is of such interest that a further Note on it may not be superfluous. It is unnecessary to set the facts out again in detail. Reduced to its simplest elements the case involved a sale of goods in which the seller had made certain statements regarding the quality of the goods to the buyer, and the latter was claiming the right to rescind the contract on the ground that these statements were false.

On these facts one would have thought the following questions arose. (1) Were the statements as to the quality of the goods a term of the contract or not? If they were, was the term a condition or a warranty? (2) If the statements were not a term of the contract (but not otherwise) could the plaintiff in any event rescind

[14] [1958] 1 Q.B. at p. 106.
[1] [1958] 1 W.L.R. 753; [1958] 2 All E.R. 402.

the contract for misrepresentation, *i.e.*, is it possible to rescind a contract of sale of goods for innocent misrepresentation? (3) If it is so possible, had the right to rescind been lost here? Of these three questions, only the third was dealt with by the court in its judgment, and by Mr. Grunfeld in his Note, but the first two questions raise important issues which should be examined.

(1) *Were the statements terms of the contract or not?*

The reports do not make it quite clear whether the plaintiff pleaded in the alternative that the defendant's statements were part of the contract, but it would appear that he did not do so, as the reports merely refer to the plaintiff's claim for rescission. It would seem, in fact, that the plaintiff deliberately placed his case on the ground of misrepresentation rather than on the ground that a term of the contract had been broken, because in the latter event his claim to reject the goods would clearly have been barred by section 11 (1) (*c*) of the Sale of Goods Act, 1893,[2] whereas he evidently hoped (wrongly as it turned out) that the right of rescission would not have been so barred. Exactly the same course was taken by the plaintiff in *Leaf* v. *International Galleries*[3] where, it will be recalled, the plaintiff had bought a picture represented by the sellers to be a Constable, and the plaintiff laid his entire case on the same ground, and even declined an invitation to amend his pleadings by adding a claim for damages. All this would seem to suggest that the buyer of goods has an option to treat terms of the contract as though they were mere representations,[4] and in the Note by Mr. Grunfeld it is assumed that a misrepresentation may coincide with a breach of condition or warranty. But it is submitted that this is quite wrong. The right to rescind for innocent misrepresentation is an equitable remedy, devised by the Chancery to fill a gap in the common law. The gap existed because common law provided no remedy for misrepresentation which was not a term of the contract. If the statement made to the buyer is in fact a term of the contract it is submitted that there can be no question of a right to rescind for misrepresentation—a court of equity would have left the buyer to his remedy at law. In technical language, a claim to rescind on the ground that a term of the contract had been broken would have been demurrable for want of equity.[5] Nothing has

[2] ". . . where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller, can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

[3] [1950] 2 K.B. 86.

[4] Indeed, in the instant case Ormerod L.J. expressly said that the buyer in *Leaf's* case could clearly have obtained damages for breach of warranty; see [1958] 2 All E.R. 406.

[5] It might indeed be argued that equity might have permitted rescission for misrepresentation even for breach of a condition or warranty, on the ground that the common law remedy for these was unduly restricted, but I know of no case to support such a suggestion.

happened since 1873 to alter this rule which is of an elementary, but fundamental, character. If this were not the case a buyer could always turn a breach of warranty (at least where the warranty was a statement of fact) into a misrepresentation and claim a right of rescission. This would almost obliterate the distinction between conditions and warranties altogether.

(2) *Can a contract for sale of goods be rescinded for misrepresentation?*

Assuming, however, that the statements in question in this case were not incorporated in the contract, the second question which ought to have arisen was whether in any event there was a right to rescind a contract of sale of goods for innocent misrepresentation. That there is such a right has been assumed on a number of occasions in recent years, especially in *Leaf* v. *International Galleries*, but the assumption has not passed unquestioned, and there are serious reasons for doubting its correctness. Thus Mr. S. J. Stoljar in 16 M.L.R. at 190–194 has seriously questioned the existence of the right, and even Benjamin on *Sale* [6] is doubtful on the matter. Moreover, the New Zealand Court of Appeal has held on the construction of a statute identical with the English Sale of Goods Act, that there is no longer any such right.[7] The present writer has also given reasons elsewhere for doubting the continued existence of this right.[8] These reasons need not be repeated here, but I cannot refrain from quoting a passage from the judgment of Atkin L.J. in *Re Wait* [9] on a very analogous point—indeed the quotation is so much in point that, had one not known the truth, one might well have thought it to be directed to this very question:

> "The Code was passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all our courts, and the particular remedy of specific performance is specially referred to in section 52. The total sum of legal relations (meaning by the word "legal" existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code. It would have been futile in a Code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights equitable rights inconsistent with, more extensive, and coming into existence earlier than, the rights so carefully set out in the various parts of the Code.
>
> "The rules for transfer of property as between buyer and seller, performance of the contract, rights of the unpaid seller

[6] 8th ed. at pp. 426–427.
[7] *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572.
[8] See my book, *The Sale of Goods*, pp. 185–186.
[9] [1927] Ch. 606.

> against the goods, unpaid seller's lien, remedies of the seller, *remedies of the buyer*,[10] appear to be complete and exclusive statements of the legal relations both in law and equity."

Yet with all these arguments, case after case is now discussed and decided as though it were still open to a court to rescind a contract of sale of goods for innocent misrepresentation. Fortunately there appears to be no case in which rescission has actually been granted, in all the cases so far the remedy having been refused on some ground or other, so the matter cannot yet be regarded as settled. Surely it is not too much to expect that fundamental questions of law of this kind will not be settled by the mere assumption that the remedy exists until, in due course, it becomes impossible to question it, because of the number of cases in which the matter has been passed over *sub silentio*.

(3) *When is the right to rescind lost?*

The third question which arises depends on the assumption that rescission is still a possible remedy. Assuming that we are wrong on this point, and that rescission is, therefore, still available, when is the right to rescind lost? It is this aspect of the problem to which Mr. Grunfeld's Note was primarily directed and it is unnecessary to repeat what he has said. It must be confessed, however, that the very difficulties which arise if rescission is once admitted (to which Mr. Grunfeld refers) lend support to the submission earlier made that the right to reject should now be regulated solely by the Sale of Goods Act. What, after all, can be the use of the detailed (if unfortunate) provisions of section 11 (1) (*c*) and sections 34 and 35 if a buyer is always entitled to put his case on the ground of innocent misrepresentation?

Two further comments may be made on this aspect of the case. First, the actual decision of the court is based on a dictum of Denning L.J. in *Leaf's* case, where he indicated that a right of rescission being a less potent remedy than a right of rejection for breach of condition, must *a fortiori* be lost when the latter right is lost. This in itself is unobjectionable—indeed, it is eminently sensible, granted that the right of rescission exists at all. Unfortunately, the dictum of Denning L.J. in *Leaf's* case proceeded on the questionable assumption that the plaintiff's right to reject for breach of condition was lost only when he accepted the goods. As *Leaf's* case was based, in the final result, on the ground of delay, no great harm was done by this assumption. It was, however, questioned by Mr. J. C. Smith in 14 M.L.R. 173 and it is difficult to disagree with the writer's conclusions that the dictum of Denning L.J. was *per incuriam*. It is, therefore, extremely unsatisfactory, to say the least, to find the very same assumption

[10] My italics.

being made without any attempt at justification in the present case, and indeed, to find the assumption being made the basis for the *ratio decidendi*.

It is not proposed to go over the ground covered by the article referred to, but the difficulty must at least be indicated. What the Court of Appeal have held in the present case is that the plaintiff's right to rescind, if any (and if unbarred by the rule in *Seddon's* case), must be lost when he has accepted the goods. Now this appears to assume that the right to reject the goods (if there has been such a right) would have subsisted until acceptance. This is an entirely satisfactory conclusion, but one would like to know how it is reached, because it appears to be contrary to section 11 (1) (*c*) of the Sale of Goods Act. This section, it will be recalled, says that in a sale of specific goods (such as the present lorry) the right to reject is lost when the property has passed to the buyer unless the contract is conditional, or there is a contrary intention. Prima facie one would have thought the property passed to the buyer when the contract was made, in accordance with section 18, Rule 1, of the Act, and if this is so, clearly the right of rejection was lost at the same moment. On the other hand, if the property did not pass when the contract was made, one would like to know, why? [11] It is not that we question the convenience or justice of the court's conclusions, but inconvenient statutory provisions cannot be just swept out of the way without discussion in this manner.

The second comment which may be made on this aspect of the case is that the actual *ratio decidendi* of the case in hand is somewhat ambiguous. (i) It might mean that the right to rescind (if it exists at all) is lost when the right to reject is lost, or (ii) it might mean that the right to rescind is lost when the goods have been accepted, no matter when the right to reject is lost. The judgment of the court could certainly read as approving proposition (ii) and Mr. Grunfeld appears to take this view, but the quotation from Denning L.J. in *Leaf's* case, on which the judgment was based, clearly proceeds on ground (i).

In conclusion, it is submitted that it is high time that questions of such fundamental importance in the law of sale of goods were properly presented to the courts. It is impossible for the law to develop properly so long as cases can be decided, as was this one, without the slightest discussion of troublesome and difficult problems of law which have been brought to the attention of the profession not once, but repeatedly. Academic lawyers must sometimes wonder whether they labour entirely in vain.

P. S. ATIYAH.

[11] The present writer has suggested one possible reason himself; see 19 M.L.R. 315.

SUEZ CRISIS FRUSTRATES C.I.F. CONTRACT

CARAPANAYOTI & CO., LTD. *v.* E. T. GREEN, LTD.,[1] concerns a c.i.f. contract affected by the blocking of the Suez Canal in November, 1956. In September of that year, the plaintiffs bought from the defendants 100 tons of Sudanese semi-decorticated expeller cotton seed cake for shipment from Port Sudan in October or November to Belfast, and the defendants made a covering purchase from Sudan Oil Mills, Ltd., of Khartoum. The contract contained a clause concerning the effect of hostilities, but in the event the court decided the case on the basis of the common law.

The arbitrators found that at the time when the contract was made shipments from the Sudan to the United Kingdom were routed through the Suez Canal, that the Canal was blocked—obviously for some considerable time—well before the last date for shipment, and that the sellers were unable to buy any cargo of cotton seed cake required afloat on c.i.f. Belfast terms west of Suez after the Canal had been closed. Sudan Oil Mills informed the sellers that they could not ship the cargo sold under the covering purchase. The sellers were accordingly unable to deliver the goods to the buyers, and the latter sued for breach of contract.

The buyers argued that after the closing of the Canal the customary route was round the Cape and that the sellers could have shipped by that route; indeed, they were bound to do so since the customary route in respect of a c.i.f. contract was determined not at the time of the contract but at that of performance. Moreover, counsel for the buyers argued, a contract for the sale of unascertained goods can be frustrated only in very exceptional circumstances, and there was in fact no decided case holding that such a contract had been frustrated otherwise than by supervening illegality.

McNair J. agreed that the material time for determining the customary route is the time of performance. Mercantile customs change rapidly, especially in times of international tension. In this particular case, however, the route round the Cape had certainly not become customary by the time shipment was due; it was then only an emergency route. While it was true that contracts for the sale of unascertained goods could rarely become frustrated, and that the 25 per cent. increase of freight for the Cape route was immaterial, since no one concluding a forward contract could refuse performance because the contract had become unprofitable, "the voyage via the Cape was more than two and a half times the length of the voyage via the Canal and includes . . . a circumstance which may involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in shipment via the Canal." It followed that it had become commercially

[1] [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

impossible for the sellers to perform the contract, and the buyers' action for damages failed.

Although this case establishes no new principle it is interesting because it does appear to be the first reported case of frustration of a contract for the sale of unascertained goods otherwise than by supervening illegality. The case is also a good illustration of the term "usual and customary route" in a c.i.f. contract. The only doubt arises from the learned judge's words that the considerably longer route "may involve the seller in quite different obligations as to the condition of the goods on shipment." The report does not refer to any evidence that such different obligations would in fact have been incurred in the particular case.

O. C. Giles.

The Extent of Res Ipsa Loquitur

The decision of the Court of Appeal in *Walsh* v. *Holst & Co., Ltd.*,[1] raises many uncertainties about the working of the rule of *res ipsa loquitur*. The facts of the case were that the plaintiff was lawfully upon the highway when he was struck by a brick. The brick came from a building to which certain substantial structural alterations were being made. It was accepted by all members of the court that a prima facie case of negligence arose against both occupier and contractor because *res ipsa loquitur*.

However, the court held, by a majority, that the burden laid upon the defendants had been discharged by their proving reasonable precautions to prevent an accident. Evidence was given that the elaborate scaffolding and fencing that had been erected was the best of its kind, and there was also shown to be a system of inspection to find loose bricks lodged in a dangerous position. No evidence was adduced to show that any inspection had in fact been carried out at the relevant time. The reason for this was partly that Boon, the foreman who had the duty of inspecting, had died.

The very similarity of these facts to those in *Moore* v. *R. Fox & Sons*[2] makes the decision the more confusing. In *Moore* v. *Fox*, it will be remembered, Evershed M.R. fastened upon the fact that the maintenance man and foreman were not called and said (p. 348) that the proper inference to be drawn from it was that there had been "no proper care or maintenance of the machine." He required evidence of conduct which, whatever the cause of the accident, was in accordance with a proper duty to take care. But in *Walsh* v. *Holst* both Hodson and Sellers L.JJ. said that *Moore* v. *Fox* turned upon there being no reasonable precautions; Holst & Co. had taken reasonable precautions, and both refused to hold that the fact that Boon was not called was any reason to suppose that he had done his job without due care.

[1] [1958] 1 W.L.R. 800; [1958] 3 All E.R. 33.
[2] [1956] 2 W.L.R. 342.

This refusal to assume negligence on the part of one for whom, had there been positive evidence of his negligence, both occupier and contractor would have been liable surely cuts down the principle in *Byrne* v. *Boadle*.[3] It will be admitted that the thing speaks of negligence but not that it will also inevitably speak of negligence on the part of a servant. We can hardly imagine that in *Cassidy* v. *Minister of Health*[4] the defendant could have satisfied the court by proving a reasonable system in general of carrying out the operation without showing that at the relevant time it was carried out without negligence by all those involved. If one seeks for some reason why the position in *Walsh* v. *Holst* was in a different category, one must turn to the judgment of Sellers L.J. who alone elaborates upon the point. He says that to require the defendants to show more once they had given evidence of their precautions would make them "insurers of the plaintiff's safety" (p. 814). It would be "pure speculation" to hold that a brick would have been discovered if someone had carried out an inspection in a proper manner. Surely in *Moore* v. *Fox* it was also "pure speculation" to suppose that the maintenance of the machine had not been carried out in a proper manner.

In fact, both Hodson and Sellers L.JJ. decide first that the precautions were reasonable and then hold that the absence of Boon does not invalidate that evidence. This leads one to seek the criterion of reasonableness. One would agree that when an event speaks of negligence of any one man the standard of care required to be proved by that man to show that he was not negligent is to be no more than that of a reasonable man. We know that a man cannot get rid of his duty to act reasonably by delegating his duty to another. This was accepted in the present case as a reason why the court should hold that *res ipsa loquitur* could apply even though there was more than one defendant. Thus the argument is taken a step further by Sellers L.J. when he says[5]: "Having regard to the precautions which were taken . . . I find it difficult to say that the defendants or any of them should have foreseen such an accident as a likely thing to occur, such as would require them to have taken even greater precautions to guard against such a happening." From the context it can be seen that his Lordship is not in fact attacking the whole principle of vicarious liability but he certainly does not make it clear how he reconciles his own opinions.

If this decision is to stand (permission has been given to go to the House of Lords), it will provide great opportunities of argument for counsel in the next "hospital" case. This judgment can hardly be said to have made the rule of *res ipsa loquitur* more

[3] (1863) 2 H. & C. 722.
[4] [1951] 2 K.B. 343.
[5] At p. 812.

fit for the purpose for which it was brought into the world which was, after all, to help plaintiffs injured in unexplained accidents.

Great sympathy must be felt with the dissenting judgment of Morris L.J. He felt that this dangerous operation was attended by risks which were not only foreseeable but which were foreseen. It was no defence to show that certain safety precautions were taken which nearly succeeded. "The conduct of all Holst's men was in issue" (p. 811). He saw no reason to suppose that a properly conducted inspection would not have revealed a brick which was in danger of falling. In the absence of evidence that such an inspection was in fact carried out with reasonable care he held that the negligence established by *res ipsa loquitur* would stand. This judgment seems much more in accordance with previous authority than the others and in particular it accords with the general tenor of the judgment in *Moore* v. *Fox* which limited the defences which could be raised to discharge the burden created by the rule of *res ipsa loquitur*.

As the court experienced no difficulty in holding that *res ipsa loquitur* would apply in spite of the fact that there was more than one defendant the attitude of Morris L.J. to the possibility that the act which caused the brick to fall was one of collateral negligence also seemed sound; he evidently required that the point should be ignored unless specially raised (p. 809). The point did not fall for decision by the other members of the court and they carefully avoided expressing any opinion.

B. Lillywhite.

Failure to Take Soundings

One of the issues raised in *Riverstone Meat Co. Pty.* v. *Lancashire Shipping Co., Ltd.*,[1] was whether the shipowner could successfully rely on the Australian Sea-Carriage of Goods Act, 1924, Sched., Art. IV, r. 2, which provides: "Neither the carrier nor the ship shall be responsible for loss or damage arising from (*a*) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship."[2] It was alleged in this case by the owners of cargo found to be damaged by sea water that the damage had been caused by the negligence of the shipowner in failing to discover by proper soundings the presence of water in the hold.

McNair J. found as a fact that regular soundings had been taken, and decided the case on another question of law, namely, whether on proof that unseaworthiness had resulted from the negligence of a workman employed by a competent ship repairer engaged by the shipowner, the result of whose negligence would

[1] [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.
[2] This rule is in identical terms with the corresponding provisions of our own Carriage of Goods by Sea Act, 1924.

not be discoverable by Lloyd's surveyors or the owner's marine superintendent carrying out their duties in accordance with the ordinary prudent practice of such persons, the shipowners should properly be held liable for failure to exercise due diligence to make the ship seaworthy.

Nevertheless, as it had been indicated to him that the case might be considered by another court, the learned judge considered that he should deal with the question whether failure to take soundings was covered by the exception in Art. IV, r. 2 (*a*), set out above.

His Lordship said that a ship at sea only kept afloat by securing that sea water was not in her, and this involved the taking of proper soundings to detect the presence of sea water, and pumping sea water out when it had been detected as having entered, or pumping periodically. Each of these operations, it was argued, was required for the ship and their neglect was "neglect to take reasonable care of the ship or some part of it as distinct from the cargo," or "a want of care of the vessel indirectly affecting the cargo."

It has been held in the U.S.A. that "sounding bilges and pumping bilges are regarded as essential acts of daily management of any ship whether laden or in ballast; hence errors and negligence in sounding and pumping out bilges are deemed errors in management, and are excused."[3] A number of cases supporting this proposition were cited to McNair J. All these were decisions under the Harter Act, 1893.

His Lordship was referred to the English case of *C. H. Smith & Sons Fellmongery, Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*[4] and he said that Singleton J. (as he then was) had held that the shipowners were in breach of their obligation under Art. IV, r. 2 (*a*) in that the presence of sea water having been found, the officers failed to use the pumps to clear the water. Accordingly the shipowners could not rely on the exception. McNair J. thought that this decision led to the odd result that the shipowners would have been protected if no soundings had been taken, yet if soundings had been taken and disclosed the presence of sea water, they were not protected if proper steps were not taken to remove the water found.

It is submitted, however, that this was not what Singleton J. decided. In his judgment the learned judge observed[5]: "It may well be said that when the chief officer made an inspection to ascertain the cause of the water leaking through the cofferdam,

[3] Knauth, *Ocean Bills of Lading* (4th ed. 1953) p. 201 citing *The Merida* (1901) 107 Fed. 146 (2CCA); *The British King* (1898) 89 Fed. 872, affd. 92 Fed. 1018; *The Ontario* (1900) 106 Fed. 324, affd. 115 Fed. 769; *The Sandfield* (1897) 79 Fed. 371, affd. 92 Fed. 663; *The Hudson* (1909) 172 Fed. 1005.

[4] (1938) 60 Ll.L.Rep. 419.

[5] 60 Ll.L.Rep. at 433.

he was doing something in connection with the management of the ship. Apparently he satisfied himself that there was no damage to the ship, as was the fact, but there was damage to the cargo and there was a duty to the cargo-owners to remove the water which was present." He then went on to say: "The duty of taking steps to protect the cargo from the water which was there was not a duty which arose in connection with the management of the ship as a ship, and following the words of Lord Justice Greer,[6] I ought not to attribute to Art. IV, r. 2 (*a*), a meaning which would nullify the effect of Art. III, r. 2, unless I am compelled to do so by clear words. The neglect of duty owed to cargo-owners does not become neglect or default in the management of the ship merely because some damage to the ship would or might have been discovered if the duty to the cargo-owners had been performed."

McNair J. said that if it had been necessary for him to express a concluded judgment on the question of whether to take soundings was within the exception, he would on the authorities, both English and American, without doubt have held that it was.

In the *Riverstone Meat Co.* case the learned judge might have been referred also to *Kalamazoo Paper Co.* v. *British Columbia Pulp & Paper Co., Ltd.*,[7] decided by the Supreme Court of Canada. In that case a ship had been run aground to prevent sinking, and the cargo-owners claimed that the damage to their goods was due in part to the negligence of the crew in failing to use pumping facilities after the vessel had been grounded. The court held that the shipowners were not liable because the negligence constituted an omission in relation to the management of the ship and not in relation to the care owed to the cargo. It affirmed the view of Sidney Smith D.J.A. that the neglect was essentially a failure in a matter that vitally affected the management of the ship, for, in giving judgment in the court below, he had observed[8]: "Had soundings been taken on arrival . . . and the ship's actual condition ascertained and appreciated, and the water then in the ship pumped out or reduced in volume . . . the ship would again have come to life; she would once more have become a going concern; might even perhaps have found it possible to get under way and move under her own power to Port Alice, twelve miles distant, for survey and temporary repairs. The failure to pump efficiently with all facilities at hand most certainly damaged further cargo, but it was essentially a failure in a matter that vitally affected the management of the ship viewed in the light of the authorities. It was a 'want of care of vessel indirectly affecting the cargo'; or so it seems to me."

E. R. Hardy-Ivamy.

[6] *Gosse Millard* v. *Canadian Government Merchant Marine, Ltd.* [1928] 1 K.B. 717 at 743.
[7] [1950] 2 D.L.R. 369.
[8] [1949] 3 D.L.R. 660 at 670.

FOLLOWING THE MONEY AT LAW AND IN EQUITY

THE greater part of the judgment of Danckwerts J. in *G. L. Baker, Ltd.* v. *Medway Building & Supplies, Ltd.*,[1] is concerned with the unsuccessful defence raised by the defendant under the Limitation Act, 1939. This note is, however, concerned with a different point, which is of considerable interest, although it occupies little space in the report. It seems desirable to begin by giving a brief account of the facts of the case, which, fortunately, were not complex. The plaintiff company had as its auditor one Titley who was a chartered accountant and a director of the defendant company. Titley was entrusted[2] by the plaintiff with the sum of approximately £80,000 which Titley paid into his business account. Titley fraudulently paid some £6,000 to the defendant by means of cheques drawn on his business account which, as appeared from the bank statement, were paid out of the moneys entrusted to Titley by the plaintiff. Titley, who was eventually tried and sentenced to a term of seven years' imprisonment for his frauds, had prior to the present action been sued to judgment by the plaintiff, but the judgment remained entirely unsatisfied and the plaintiff had never succeeded in recovering any part of its moneys from Titley. The plaintiff now sought to recover from the defendant the sums which the defendant had admittedly received from Titley.

It appears clear from the judgment that the defendant would have succeeded if it had been able to show that it had received the cheques in good faith, and for value, and without notice of the want of authority. The court held that the defendant took without notice and for the purpose of the judgment was prepared to assume that it received the money in good faith. It was, however, not permitted to give any evidence to show that it had given value, since no allegation to this effect appeared on the pleadings.[3] The result was that, whatever the merits may have been, the plaintiff in fact succeeded by reason of a defect in the defendant's pleadings.

Having stated the facts, and the actual decision on this point, I should perhaps, before discussing the law, confess that I write from the standpoint of one who doubts whether it is true to say: "It is no longer appropriate, however, to draw a distinction between law and equity."[4] It is right to observe at once that *Nelson* v. *Larholt*,[5] from which this proposition is taken, was

[1] [1958] 1 W.L.R. 1216; [1958] 2 All E.R. 532.

[2] I shall assume, as seems probably to be the fact, that Titley was properly to be regarded as a trustee.

[3] An application by the defendant for leave to amend so as to enable it to allege such giving of value was refused by the judge. However, the Court of Appeal has now allowed an appeal against the refusal of the application to amend, and a new trial has been ordered ([1958] 1 W.L.R. 1216, at p. 1225; [1958] 3 All E.R. 540).

[4] *Per* Denning J. (as he then was), *Nelson* v. *Larholt* [1948] 1 K.B. 339 at p. 343; [1947] 2 All E.R. 751 at p. 752.

[5] *Supra.*

decided before the judgment of the Court of Appeal in *Re Diplock*,[6] a somewhat similar case in which, it will be remembered, a clear distinction was drawn between the common law claim for money had and received and the direct equitable action which was held to be available to the plaintiff in that case. It is at first sight curious that *Nelson* v. *Larholt* [7] was not referred to in *Re Diplock* [8] either in the Court of Appeal or the House of Lords, though it does not appear that the former case really involved any novelty: it would seem to have been in essence simply an example of the well-established type of case where a person has received trust property with notice [9] that it was trust property and that the transfer to him was a breach of trust and accordingly the transferee must be held liable as a constructive trustee.[10] The law applicable would appear to have been clear and the only real point at issue to have been whether, upon the facts, the defendant could be charged with notice. The reason for the absence of mention of *Nelson* v. *Larholt* [11] in *Re Diplock* [12] may well lie in the important distinction that, as already mentioned, in the former case the court was concerned with someone who was alleged to have notice of the trust, an allegation which, if proved to the satisfaction of the court, would make him a constructive trustee and liable to the plaintiff notwithstanding the fact that he had given value: whereas in the latter case the allegation of notice, though "somewhat faintly argued" in the Court of Appeal, was not established and the case turned on the position of an innocent volunteer. In this important respect it is to be observed that *Baker* v. *Medway Building Supplies* [13] is analogous to *Re Diplock* [12] and not to *Nelson* v. *Larholt* [11] for the court assumed that the defendant received the money in good faith and held that it was plain that it received it without notice of the breach of trust. The point, as in *Re Diplock*,[12] was that the defendant was (or, at least, by reason of the pleadings was to be regarded as) an innocent volunteer.

In the course of his judgment in *Nelson* v. *Larholt*,[11] however, Denning J. (as he then was) took the opportunity of stating a general principle [14] which was adopted by Danckwerts J. in *Baker* v. *Medway Building Supplies* [12] as the basis of his decision. With respect, it is, however, submitted that it is not, in cases of this

[6] [1948] Ch. 465; [1948] 2 All E.R. 318; affd. H.L. *sub nom. Ministry of Health* v. *Simpson* [1951] A.C. 251; [1950] 2 All E.R. 1137.
[7] *Supra.*
[8] *Supra.* The decision at first instance preceded *Nelson* v. *Larholt.*
[9] Either actual or constructive notice suffices (*i.e.*, the test is objective) and it is irrelevant whether or not value was given.
[10] See Underhill's *Law of Trusts and Trustees*, 10th ed., p. 211; Scott, 71 L.Q.R. 39 at p. 48.
[11] *Supra.*
[12] *Supra.*
[13] *Supra.*
[14] The material on which the principle was based was set out by the learned judge in an article in 65 L.Q.R. at p. 37.

kind, sufficient to say that the right "falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires."[15] It is further submitted, contrary to a further dictum, that remedies do still depend, to some extent at least, upon "whether they can be fitted into a particular framework."[15] As the Court of Appeal observed in *Re Diplock*,[16] in relation to the alleged equitable action *in personam* in that case, "if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time."

The first obvious classification is into common law remedies and equitable remedies, and on the facts of *Baker* v. *Medway Building Supplies*[17] it is clear that common law remedies were inappropriate since the plaintiff had merely an equitable interest in the £80,000 received by Titley.[18] It is only necessary, therefore, to consider equitable remedies, and in relation to proceedings by the plaintiff against the defendant transferee (as distinct from Titley) one meets a further classification, namely, into a claim *in personam* against the defendant which (if successful) would impose upon him a purely personal liability, and a claim *in rem*, in respect of the money itself (or the property into which it had been turned) which would have the effect of making the money or property available to the plaintiff, but would not otherwise involve the defendant in personal liability. This classification is, of course taken from *Re Diplock*.[19]

It is, perhaps, not surprising, in view of the reliance placed on *Nelson* v. *Larholt*,[20] to find that it is difficult to apply this classification to the judgment in *Baker* v. *Medway Building Supplies*[21] and so to ascertain whether that case is properly to be regarded as a decision upon a claim *in personam* or *in rem*. The actual citation from *Nelson* v. *Larholt*[20] with the reference to recovering "the amount from any person into whose hands it can be *traced*" suggests a claim *in rem*, a view which is supported by the fact that the plaintiff appears to have succeeded in his claim for interest, to which, according to *Re Diplock*,[22] in so far as this is relevant in this context, it would not have been entitled on a claim *in personam*. On the other hand, a claim *in rem* involves following or tracing the money paid and there does not appear to

[15] *Nelson* v. *Larholt* [1948] 1 K.B. at p. 343; [1947] 2 All E.R. at p. 752.
[16] [1948] Ch. at pp. 481–482; [1948] 2 All E.R. at p. 326.
[17] *Supra*.
[18] See n. 2, *supra*.
[19] *Supra*.
[20] *Supra*.
[21] *Supra*.
[22] *Supra*.

have been any inquiry as to the disposal by the defendant of the sum of some £6,000 paid to it by Titley.[23] There is not even a suggestion that the court was concerned to know whether the defendant still had the identifiable money or, if not, what had happened to it. Indeed it was expressly said that the action really was not based on the fact of retention.

Little would seem to be gained from further analysis of the judgment, but, assuming that it is right to distinguish between the different claims, it may be useful to consider briefly how the equitable claim *in personam* and the equitable claim *in rem* respectively might apply to the instant facts.

As to the claim *in personam*, *Re Diplock*[24] establishes the right of an unpaid or underpaid creditor, legatee or next-of-kin as against a volunteer (even without notice) where the trustee involved is a personal representative and the claim is made in respect of his deceased's estate. In that case, in the House of Lords, however, Lord Simonds stressed that "it is important in the discussion of this question to remember that the particular branch of the jurisdiction of the Court of Chancery with which we are concerned relates to the administration of assets of a deceased person. While in the development of this jurisdiction certain principles were established which were common to it and to the comparable jurisdiction in the execution of trusts, I do not find in history or in logic any justification for an argument which denies the possibility of an equitable right in the administration of assets because, as it is alleged, no comparable right existed in the execution of trusts."[25] It must, at the least, be a matter of considerable doubt as to whether a direct equitable claim *in personam* of the *Re Diplock* type will lie except in a case relating to the administration of a deceased's estate. The present case, of course, does not involve a deceased's estate and equity lawyers will regret the absence of any discussion of the difficulties involved in applying a very special administration rule to a case on trusts. It is, perhaps, not inappropriate to recall that the equitable claim *in personam* as applied in *Re Diplock*[26] has at least one inequitable characteristic, in that it will lie against a volunteer (who *ex hypothesi* has taken bona fide and without notice) notwithstanding that he has altered his position on the assumption that he was entitled to the money, which may, indeed, have disappeared leaving no monetary trace behind.[27]

With regard to the claim *in rem*, it is impossible to express an opinion as to whether the plaintiff should have succeeded as the

[23] *Cf. Re Diplock* [1948] Ch. at p. 476; [1948] 2 All E.R. at p. 323. See also the final paragraph of this note.
[24] *Supra.*
[25] *Per* Lord Simonds [1951] A.C. at pp. 265–266; [1950] 2 All E.R. at p. 1140.
[26] *Supra.*
[27] See the discussion by O. R. Marshall in Nathan's *Equity Through The Cases*, 3rd ed., p. 452.

facts as to the disposal of the money by the defendant do not appear. In this connection, it will be remembered that it was held by the Court of Appeal in *Re Diplock* [28] that *Clayton's* case [29] applies where an innocent volunteer mixes trust moneys with his own moneys, and also that the claim *in rem* comes to an end if the money is not capable of being followed or if the circumstances are such that the only remedy available in equity would not produce an equitable result. If, as is to be hoped from a legal point of view, this case goes to the Court of Appeal, it will be interesting to see (if the point is there dealt with) whether, once the plaintiff has traced his money into the defendant's hands, the onus is put upon the defendant to show that the right to follow the money has come to an end.[30] Perhaps the matter may, after all, on this point too, be decided on the pleadings for, as the judge observed, the defence might be construed as an admission that the defendant still retained the moneys.[31]

P. H. PETTIT.

AIDING AND ABETTING A STATUTORY OFFENCE

HAD Slade J. been in a position to agree with the other members of the Divisional Court in *National Coal Board* v. *Gamble*,[1] the case might have provided some important guidance on the question of the criminal responsibility of corporations for the acts of their servants or agents. As it was, the case turned upon the narrower question of the intent necessary to constitute the offence of aiding and abetting.

The facts of the case were that the Coal Board had an instalment contract with the Central Electricity Authority for a supply of coal to be delivered at the colliery into lorries sent by a carrier on behalf of the authority. Loading was done through a hopper operated by the Board's servants until the lorry driver, one Mallender, told them to stop. The driver then took the lorry to the weighbridge, where it was weighed by one Haslam, an employee of the Board, and was found to be loaded above the maximum permitted weight for the lorry. Haslam informed the driver of the excess weight and asked him whether he intended to take the full load away, there being facilities for off-loading at the colliery. Mallender said that he would risk it, whereupon Haslam made out the weight ticket and handed it to Mallender, who drove the lorry away. Mallender's employers were subsequently convicted,

[28] *Supra.*
[29] (1816) 1 Mer. 529, 572.
[30] Probably it is. The facts are within the defendant's knowledge but almost inevitably outside the plaintiffs.
[31] [1958] 2 All E.R. at p. 534. But Jenkins L.J., in the Court of Appeal, thought it would be unreasonable to treat the relevant paragraph of the defence as such an admission ([1958] 1 W.L.R. at p. 1228; [1958] 3 All E.R. at p. 543).
[1] [1958] 3 W.L.R. 434; also reported [1958] 3 All E.R. 203.

in consequence of his driving this load, of unlawfully using the lorry on a road, in contravention of regs. 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. At the hearing of the information against the Coal Board for having aided, abetted, counselled and procured the commission of the offence, the Board called no evidence and were convicted. The majority of the court (Lord Goddard C.J. and Devlin J.) held that completing the sale with knowledge of the intended illegality was aiding and abetting the unlawful use of the lorry, since Haslam must be presumed to have intended the natural and probable consequences of his act and, in the absence of any evidence on behalf of the Board, the intent necessary to constitute aiding and abetting was proved. Slade J. thought that the prosecution must prove that the act relied upon as constituting aiding and abetting was done with a view to encouraging the principal offender or with the motive of endorsing the commission of the offence. Counsel for the Board had invited the court to identify the Coal Board with their servant Haslam, and since he thought that the offence had not been proved, Slade J. dealt with the appeal on that basis, adding " though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise." [2] Before considering the actual decision of the court, it might be interesting to look at the possible grounds for making the Board liable for the act of their servant.

Where the offence is one of absolute prohibition, a master may be made vicariously liable for the acts of his servants, and the same applies to a corporation.[3] This is clearly inapplicable to the present case, where the offence was one involving *mens rea*. However, it now seems clear that a corporation may be liable at common law for the acts of its servants or agents on the basis of the theory that the acts and states of mind of certain officials may be treated as those of the corporation itself.[4] To what officials this rule applies is not yet certain. In *Moore* v. *Bresler, Ltd.* Lord Caldecote regarded the sales manager as an " important official " for whose acts the company could be responsible. Even if one concedes that Haslam holds an important position, that would hardly justify holding the Board criminally responsible for his acts. Perhaps the rule should only be applied to the acts of those officials who can act under the direct authority of the constitutional document and regulations of the corporation without any further human intervention.[5]

The only remaining ground for making the Coal Board liable for the act of Haslam is that of ratification. Without going into

[2] [1958] 3 W.L.R. at p. 445.
[3] *Mousell Bros.* v. *L. & N. W. Ry.* [1917] 2 K.B. 836.
[4] *D. P. P.* v. *Kent & Sussex Contractors, Ltd.* [1944] K.B. 146; *R.* v. *I. C. R. Haulage, Ltd.* [1944] K.B. 551; *Moore* v. *Bresler, Ltd.* [1944] 2 All E.R. 515.
[5] See Powell, *Law of Agency*, p. 236.

the *ultra vires* doctrine, it is by no means clear that this is sufficient to render a person criminally responsible for the crimes of his servant or agent. In *R.* v. *Dring*,[6] on an indictment for receiving, the jury found that the wife had received the goods without the knowledge of the husband, and that he afterwards adopted the wife's receipt. The husband's conviction was later quashed, Cockburn C.J. saying: "The word 'adopted' may mean that the husband passively consented to what his wife had done, without taking any active part in the matter; and in that case we think it would not be right to say that he was guilty of receiving."[7] Even though the husband appeared to have sufficient knowledge of the facts to ratify his wife's act, it seems that he must take some positive action before he can be guilty of receiving. In *R.* v. *Woodward*,[8] a case usually cited in support of criminal responsibility by way of ratification, the prisoner took an active part in the matter, so that the reference to strict agency principles was scarcely necessary.[9] Apart from purely legal considerations one may ask whether it is in accordance with public policy for the courts to allow a person to accept responsibility for the crimes of another. Be that as it may, it is submitted that Slade J. would have had good cause to doubt the criminal responsibility of the Coal Board, had he found the offence proved against Haslam. However, since the court accepted the Board's assumption of responsibility without argument by counsel, it is necessary to look closely at the views expressed on the elements of aiding and abetting.

In the first place, it should be noted that the offence, for which the Board could be liable, was that of counselling and procuring, rather than aiding and abetting. Although all these words can be used in the information,[10] it is useful to remember the distinction, since it may mean that there is a slightly heavier burden on the prosecution, when the person is not present at the scene of the principal offence.

Having stated that knowledge of the circumstances constituting the offence was necessary, Lord Goddard and Devlin J. then considered the Coal Board's state of knowledge at the time the sale was completed. The property in the coal did not pass until Mallender accepted the weight ticket, and at that time Haslam knew of the intended illegality. Having this knowledge, Haslam could have refused to transfer the property, and by completing the sale he committed the offence. But it would seem that the passing of the property was entirely irrelevant. When the coal was in a deliverable state, that is, when it was weighed, it was the duty of the

[6] (1857) Dearsley & Bell 329.
[7] p. 332.
[8] (1862) Le. & Ca. 122.
[9] See Blackburn J. at pp. 123 & 126–127.
[10] *Re Smith* (1858) 3 H. & N. 227.

Coal Board to deliver it, irrespective of whether the property had passed. If the seller fails to deliver, the buyer is entitled to damages for non-delivery. The passing of the property merely gives him (at least in theory) an additional claim in detinue or conversion. In the present case, there was no knowledge before delivery; by completing delivery, Haslam was merely avoiding a breach of the duty to deliver, which, according to the explanation of *R.* v. *Lomas* [11] given by Devlin J.,[12] would be in law a negative act. There would seem to be no difference in principle between refraining from detinue and refraining from breach of contract. Nor does it seem correct to say that, if knowledge is acquired after delivery has begun but before it is completed, the position must be the same "as if knowledge had been obtained before the delivery had begun." [13] Perhaps the court was misled into treating the passing of the property as material by the opinion of the justices.[14]

Lord Goddard was content to rest his judgment on Haslam's state of knowledge at the time the sale was completed, but Devlin J. went on to consider the question of intent to aid. There must be proof of intent to aid, and that involves proof of a positive act of assistance voluntarily done. Although supplying the criminal with essential material, with knowledge of the illegal purpose, is not conclusive evidence of intent to aid, prima facie "a man is presumed to intend the natural and probable consequences of his acts, and the consequence of supplying essential material is that assistance is given to the criminal." That is sufficient. It is not necessary to prove an interest in the crime or an express purpose to assist it. Devlin J. thus rejected counsel's argument that the purpose or motive of encouraging the crime is essential. Whilst one may agree that voluntary presence at the scene of the crime is prima facie evidence of encouragement and therefore of aiding and abetting, one cannot be quite so dogmatic about the supply of essential material. In the former case the inference that the bystander intended to aid or encourage the principal offender is a strong one; in the latter, the inference is much weaker, since the supply of essential material may be made in a variety of circumstances. There would seem to be a distinction between transferring possession of an article to the criminal by way of loan or gift, and transferring possession under a contract of sale or bailment. This, with respect, seems to be the distinction between *R.* v. *Bullock* [15] and *R.* v. *Lomas*.[16] Where the alleged assistance takes the form of supplying essential material to the principal offender by a person who is not actually or constructively present, it is submitted that

[11] (1913) 9 Cr.App.R. 220.
[12] [1958] 3 W.L.R. at p. 440.
[13] *Per* Devlin J. at p. 443.
[14] See at p. 437.
[15] [1955] 1 W.L.R. 1.
[16] (1913) 9 Cr.App.R. 220.

something more than proof of knowledge and transfer of possession is required. That additional element, as counsel for the Coal Board argued, is proof of encouragement. The judgment of Hawkins J. in *R.* v. *Coney*,[17] where the accused was present at the scene of the crime, seems to indicate quite clearly that encouragement is necessary. And similarly in *Wilcox* v. *Jeffery*[18] the court placed emphasis on the accused's motive and subsequent conduct. Whereas in cases where the accused is present at the time the principal offence is committed encouragement can be inferred from presence, one must look elsewhere for encouragement in cases where the accused is not present. It is in this connection that the view of Slade J. is to be preferred. Speaking of Haslam's conduct he said[19]: "Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence." In his view, the facts did not justify the inference that Haslam completed the sale with a view to encouraging Mallender. Supplying material under a contract does not lead naturally to the conclusion that it was done with a criminal or sinister purpose.

Although, it is submitted, the conviction should have been quashed, the other members of the court may have been influenced by the absence of evidence on behalf of the Coal Board, and by the contention that aiding and abetting the commission of an offence of absolute liability was also an offence of absolute liability.[20] What might have been a leading case on aiding and abetting, and possibly vicarious liability, is reduced in stature by the peculiar facts of the case and the absence of unanimous judgments. At the end of Lord Goddard's judgment there is a veiled suggestion that proof of negligence might be sufficient. In his words[21]: "The object of the legislation is to protect the roads of the country from damage to which the Coal Board would directly contribute if they allow excessive weight to be taken from their premises." The Coal Board is not obliged to give the weight ticket to the driver, and if their servants are instructed to refuse a ticket to a driver with an excess load, the Board will not be guilty of aiding and abetting if he nevertheless drives away with the load. Presumably in these circumstances the Board will have acted reasonably.[22]

B. W. M. DOWNEY.

17 (1882) 8 Q.B.D. 534 at p. 557.
18 [1951] 1 All E.R. 464.
19 At p. 445.
20 See p. 436.
21 At p. 439.
22 See *Carter* v. *Mace* [1949] 2 All E.R. 714 and *Davies* v. *Brodie* [1954] 1 W.L.R. 1364.

Insurance and Damages for Loss of the Breadwinner—A Problem of Statutory Interpretation

How should the courts apply a statute to new circumstances which were not contemplated by the legislator? Whatever is done will amount to judicial law-making, but the decision may well depend on whether this is frankly admitted or whether it is pretended that it was the legislator who provided the solution which has to be spelt out of the words of the statute which in the process will acquire a fresh and possibly unsuspected significance.

An instructive demonstration of this problem has recently been provided by the Fatal Accident (Damages) Act, 1908. It established an exception to the rule that, when assessing damages for loss of the breadwinner, gains arising from his death must be balanced against the loss suffered by the dependants. This exception was laid down for "any sum paid or payable on the death of the deceased under any contract of insurance." When the Act was passed group policies of life insurance taken out by employers in respect of their employees were unknown. The question whether the exception enacted in 1908 should be extended to policies of insurance of this kind could therefore be approached either as one which would require a new rule made deliberately, or as one which the legislator must be deemed to have answered himself in 1908.

The former approach would lead to investigation of the policy which the Act of 1908 was intended to advance. Was it the object of the Act to encourage and protect thrift? Or was it concerned simply to deny to the person responsible for the death of the breadwinner the benefit of financial provisions made by someone else, so that it should not be cheaper to kill an insured, rather than an uninsured person? Both assumptions as to the aim of the Act would permit its extension to policies of insurance taken out by a third person such as the employer of the deceased, but if protection of thrift was the aim of the Act, it would be essential that the deceased had contributed to the payment of premiums. If the Act was designed to deny to the wrongdoer the benefit of insurance taken out by someone else, then it would be difficult to explain its extension to a policy of insurance which had been taken out by the wrongdoer.

The courts have preferred to approach the question whether policies of insurance taken out by the employer of the deceased breadwinner are covered by the Act of 1908, not by speculating about the policy behind the Act, but by interpreting the intention of the legislator as expressed in the words of the Act. In *Bowskill* v. *Dawson* [1] the Court of Appeal relied on the fact that the Act of 1908 used the comprehensive phrase "any contract" to justify the conclusion that the Act was intended to apply regardless of whether the deceased was a party to the contract of insurance. It

[1] [1955] 1 Q.B. 13.

had been argued in that case that, since the policy of insurance had not been taken out by the deceased, payment had been made, not "under any contract of insurance," as required in the Act, but under the terms of a trust established by the employer. This argument was met by pointing out that a payment to third party beneficiaries, whether entitled in law or equity, was still made under the contract since the effects of the contract were not exhausted until such payment had taken place. The position of third parties who had no legal or equitable right to enforce the contract was specifically left open, but it was quite clear that in that case a different reply would have to be found to meet the argument that payment must be under any contract of insurance.

This situation came before the court in *Green* v. *Russell*.[2] In this case Ashworth J. found that the employer who had taken out the insurance did not intend to hold any payments received from the insurer in trust for the employee or the employee's dependants. The contention that the deceased or his dependants were entitled at common law as third party beneficiaries to enforce payment under the contract of insurance, which could only be supported by accepting the highly unorthodox views of Lord Denning on the effect of section 56 of the Law of Property Act, was one on which the learned judge preferred to remain silent, which he could do since he was prepared to hold that the Act of 1908 applied to contracts of insurance taken out by someone other than the deceased under circumstances which gave to the deceased no right, legal or equitable, to enforce the contract. To reach this conclusion he relied, as the Court of Appeal had done in *Bowskill* v. *Dawson*, on the "double use of the word *any*" in the Act and on the absence of any words limiting its scope to cases in which the deceased had some enforceable right to the insurance money. To meet the argument that the Act applied to payments "under" a contract of insurance, and not to payments under a sense of moral obligation, Ashworth J. relied on the decision in *Bowskill* v. *Dawson*, where this particular argument, if sound, would have been successful, although this would seem to ignore the fact that the argument in question had failed to succeed in *Bowskill* v. *Dawson* precisely because of those circumstances which distinguished that case from *Green* v. *Russell*. The point which arose in the later case had merely been left open in the earlier decision: it had not been decided in the same sense.

Ashworth J. also suggested that the purpose of the phrase "under any contract of assurance" was merely to be descriptive of the sum paid without implying the requirement that it must be paid to the deceased or his dependants by virtue of any rights under the contract. If this suggestion is to be read as an argument, rather than as a mere restatement of the conclusion, it would be

[2] [1958] 3 All E.R. 44, also reported [1958] 3 W.L.R. 371.

open to the objection that it appears inconsistent to deny full significance to the word " under," by treating it as merely descriptive, when at the same time the word " any " is taken to have been chosen advisedly in preference to something less comprehensive.

It would seem that the process of extending the exception enacted in 1908 by means of literal interpretation had reached its limit in *Bowskill* v. *Dawson*. The attempt to go beyond these limits, which was made in *Green* v. *Russell*, was bound to encounter logical and also practical difficulties in the circumstances of this case where damages were claimed from the employer who had insured the life of the deceased breadwinner. The employer had not yet paid in full to the dependant the sum which he had received from the insurer. The decision established the dependant's right to damages without accounting for the insurance money, but whether both sums, damages and insurance, would be paid to the dependant was still left to the choice of the employer. In theory the employer had lost the action, in practice he could still achieve success by withholding the insurance money. An extension of the Act of 1908 to contracts of insurance made by employers without conferring any rights on the deceased or his dependants could be defended on grounds of policy where damages are claimed from a stranger, as in *Bowskill* v. *Dawson*, as distinct from the case where, as in *Green* v. *Russell*, damages are claimed from the employer. But to reach this intelligible distinction would appear to be beyond the resources of literal interpretation which did not permit that any notice should be taken of it.

A more liberal interpretation of the Act of 1908 was adopted on another issue in *Baker* v. *Hopkins*.[3] In this case just under half of the substantial estate left by the deceased arose from policies of insurance which the deceased himself had taken out. The defendant from whom damages were claimed under the Fatal Accidents Acts admitted that, in order to estimate the extent to which the dependants had benefited by the death, it would be necessary to deduct from the gross amount of the estate the debts, including estate duty, and also the insurance moneys, but the defendant claimed that, instead of deducting the whole of the estate duty, only that portion should be deducted as would have been payable if the deceased had not been insured. This contention would seem to be in accordance with the general approach to the determination of the effect of tax on the assessment of damages, as shown in *British Transport Commission* v. *Gourley*[4] and, more particularly, in relation to the assessment of future earnings for the purpose of the Fatal Accidents Acts, in *Bishop* v. *Cunard White Star Co., Ltd.*[5] It would also seem to follow from strict interpretation of the Act of 1908 which directs that no account should be taken of

[3] [1958] 3 All E.R. 147, also reported [1958] 1 W.L.R. 993.
[4] [1956] A.C. 185.
[5] [1950] P. 240 at p. 250.

insurance payments, but does not extend this privilege to estate duty payable thereon. This argument was nevertheless rejected, in reliance on the broad policy, or, as it was put by Barry J., the " real meaning " of the Act, which intended that dependants should enjoy in full and tax free the benefits resulting from insurance.

J. UNGER.

REVIEWS

The Advocate's Devil. By C. P. Harvey, Q.C. [London: Stevens & Sons, Ltd. 1958. xi and 166 pp. 12s. 6d. net.]

Readers of this *Review* should be familiar with Mr. Harvey's exhilarating style and stimulating thought. In this little volume he pursues his normal course of shocking his readers, that is, if they are barristers, yet at the same time dazzling them with the pungency of his attack. For the object of his book is to overthrow and trample in the dust all the normal defences of the morality of the advocate's profession, as well as to call into question many of the other cherished illusions of orthodox lawyers. Lord Monckton, one of the leading advocates of his day, who contributes a foreword, aptly sums up what will be the feelings of most of his fellow advocates who read the book when he says that he has found it "provocative, even in places irritating, but stimulating, amusing and well worth reading and therefore possessing . . . The arguments are presented with subtlety and wit . . . Stung, discomfited, and entertained though I have been by the book. . . ."

I am a little puzzled by the title chosen for this book by Mr. Harvey, whose role is of course that of the devil's advocate, and who in writing it has certainly not assumed the position of "devil" to any of the great advocates such as Simon, Macmillan and Hilbery J. whose special pleading in defence of advocacy he treats so irreverently. But a devil's job is to assemble material for his master, and this devil has certainly brought together a wealth of illustration and quotation, much of it both unusual and unconventional which he uses effectively in the deployment of his argument, and which cannot fail to entertain his readers.

Although the chapter on advocates is the outstanding one—I do not propose to reveal the thesis which Mr. Harvey propounds so convincingly (up to a point)—he does not spare juries, judges, solicitors and the common law, on whom he also includes chapters. Juries he naturally regards as the illegitimate prey of the skilful advocate, but only a little more so than are judges. And certainly I have seen both juries and judges who were artfully played up in the way Mr. Harvey describes. But juries differ a great deal and even Mr. Harvey would have his work cut out with some Lancashire juries I have met. As for judges, as he says, they are human beings, not all of whom are so gullible as Mr. Harvey makes out: some of them are as shrewd and able as the late Rigby Swift; it went hard with the too clever advocate who tried a fall with that redoubtable north-countryman.

In respect of solicitors Mr. Harvey's main concern is to prevent fusion. He makes his case largely by the skilful use of anecdotes from America, which leave one wondering how much actual experience he has had of legal work in that country, and by a somewhat unrealistic account of the relationship of barrister, solicitor and witness as it works out in practice in England —or are the Bar Council's pronouncements more strictly observed now than they were when I was in practice?

When he gets to the common law Mr. Harvey returns to earth and demolishes that prized institution in a few typically mordant sentences. His opening gambit is typical; after quoting an effusive sentence or two from McCardie J. (an Irishman after all) about "the common law of England" standing "forever in the noblest pages of history" he comments "it would be nice if you could say that you had never heard such nonsense in your life. But you can't, because you have." And he goes on to detail all the well-known instances where the common law went seriously wrong; no contribution

between joint tortfeasors; misfeasance and non-feasance; consideration; common employment; invitees and licensees, etc. etc. One of the most effective passages in this chapter is an analysis of the character of the "reasonable man," "this insufferable creature": incidentally we are told that "the Reasonable Woman" is "a character unknown to the law"! Bull's-eyes are perhaps easy to score on these targets, but one cannot help admiring the dexterity of the marksmanship. Yet, as Lord Monckton says, one has an uneasy feeling that weight should attach to the considerations which are left out.

In a chapter entitled Moral Landscape our author at last reveals the underlying urge which has driven him to write this book; it is his intense concern with morals. He is a believer in a rather old-fashioned Christian ethic which teaches the turning of the other cheek, and finds it difficult to condone indulgence in litigation at all. One should make peace with one's adversary while "in the way with him,' and not enforce one's rights against him in the courts. Hence advocacy, which is the artillery of the legal battle, is at best "a necessary evil": just as in the opinion of St. Paul the main object of marriage is the prevention of sin, so in civilised society forensic warfare is substituted for the battle with club and dagger. What the devil Mr. Harvey is doing in this galley where every member of the crew apparently wears a silk gown is not so very clear. He would probably say "earning my living in the way in which God equipped me to do it," which would be "reason good enough."

To the cynic, whose ranks God forbid that I should join, Mr. Harvey's final chapter will no doubt provide food for sardonic amusement. At its head he collects some choice quotations about the virtues of the legal profession couched in much the same exuberant terms as those which when used about the common law he earlier castigated so mercilessly. He admits that he finds the use of them "rather embarrassing" and after what has gone before one can well understand this feeling, but his own moral principles force our author to confess at this stage that his earlier strictures are only true of the legal profession in earlier ages, or possibly in other lands, such as the U.S.A. And so he decides for a "happy ending" and a profession becoming filled with sober, hardworking, courteous lawyers, no longer taking advantage of one another's mistakes, or even those of the witnesses! If they have become judges they are no longer "pompous"—Mr. Harvey did you never appear before Mr. Justice A or B or C or D?; if they are at the bar they no longer apparently "seek out the company of or associate unduly with solicitors"; if they are solicitors . . . well I suppose solicitors never could do any wrong, except for the small minority whose misdeeds are always bringing them before the Disciplinary Committee at the Law Society. Mr. Harvey is, of course, moving up the Establishment and before so very long excerpts from his last chapter will figure in other books about advocacy. And yet some of his old admirers will prefer to recall his earlier and less reverent phase when though perhaps equally far from attaining one hundred per cent. objectivity and truthfulness the salt retained a good deal of savour, and the arrow winged its way on to some part of the target.

C.

PROBLEMS OF LEGAL PHILOSOPHY. By FREDE CASTBERG, Professor of Constitutional and International Law at the University of Oslo, Rector of the University. [Oslo: Oslo University Press; London: George Allen & Unwin, Ltd. Second revised English edition. 1957. 120 pp. 16s. net.]

THIS important book was first published in Norwegian in 1939 and in English in 1948. The present edition shows few changes from the earlier English edition but the substantial merits of the work call for extended notice.

Scandinavian legal theory has hitherto been mainly associated in our minds with the doctrines of the late Axel Hägerström and his followers. Professor Castberg is not unappreciative of these writers, especially of Professor Alf Ross, but he definitely rejects their belief that it is "realistic" to eliminate from an account of law the notions of norm, legal duty and validity. "Without these notions," he objects, "all juridical thinking is impossible." He himself takes a wider view. For him there are many ways of thinking *in* law and of thinking *about* law and the philosophy of law has not one fundamental problem but many.

Summaries of the contents of a book make dry reading but may sometimes be useful. In his first chapter Castberg differentiates between: legal dogmatics; history of law; sociology of law; philosophy of law. Legal dogmatics, which is the occupation of the practitioner, the student and the teacher of positive law, is an evaluating science, for all that its valuations are bound by its own postulates of validity. History of law is, or should be, non-valuing (except in so far as the historian by his choice of material indicates his judgment as to what is important) and it is individualising. Sociology of law, on the other hand, is generalising; it too is, or should be, non-valuing, although often, as in Marxism and also in "bourgeois" political economy, valuations "smuggle themselves in." Kelsen's rejection of the sociological-causal view of law has as little justification as the realists' rejection of the normative-dogmatic view; each view has its place. Finally, the philosophy of law, which is "a branch of ethics in the widest sense of the word," aims neither at dogmatic interpretation nor at causal explanation. Its task is (1) "to try to understand law as a spiritual phenomenon—to determine the notion of law and examine the logical character of legal thought and the logical possibility of an objective valuation of the contents of the law"; (2) and secondarily, "to try to determine the contents of what is *right* law."

The notion of law is not exclusively *a priori*. It is founded in the world of reality but (here Castberg departs from the school of Hägerström) it is not merely psychological-factual. The notion of "bindingness" is *a priori* and formal and cannot be eliminated. (This, we may interpolate, seems to be what Austin was groping after in his discussion of "command" and "duty.") Law cannot be regarded merely as a science of means, for we still have the problem of the choice of the end and the notion of duty to aim at the chosen end. Nor does the "existence" of law mean existence as a sum of the contents of any human consciousness. Legal norms have their own ideal content of thought.

Discussing the problems of legal thinking we find that normative-syllogistic thinking is both justified and necessary, even if it is not sufficient. Other forms of logic also are justified and necessary. Even although there is a margin of uncertainty, our sense of moral right cannot be reduced to an indefinite emotional appeal. In this chapter Castberg discusses also the possible conflicts between the ends of security and of justice and with the "constructive" (that is, concept-constructing) method, which attaches importance to lucidity and logical connection, he compares the sociological-teleological method, which is still the ruling method in the Scandinavian countries and of which he observes, "It is marked by an ill-founded confidence in the power of human beings to find out the concretely correct decision from a kind of juridical 'intuition'." Legal thinking displays a kind of sliding scale from certainty of correctness to uncertainty and, farther, to certainty of incorrectness. "It must be the task of legal science to achieve results that represent the highest degree of certitude." For this task neither method can be relied on by itself.

The notion of the sliding scale is prominent also in the last chapter, which deals with the valuation of law. Here we note on the one hand that law would be useless if there did not exist some psycho-physical causal connection in human life and on the other hand that law by attributing guilt or merit to

persons implicitly assumes the freedom of the will. To reconcile this opposition Castberg offers a theory of the will being more or less free according to the strength of the psychological forces affecting it. To the further, and ultimate, question of the objectively right law he similarly offers what we might call a relatively relativistic solution (rejecting the consistent relativism of Radbruch's early writings), *viz.*, that there is an objectively right law but there are varying degrees in the certainty of our understanding of it. The present reviewer, being perhaps a more absolute relativist (or sceptic), finds this chapter not quite convincing.

Enough has been said to indicate the character of Castberg's doctrine, broadly based, not giving exclusive attention to one problem or showing exclusive preference for one method, seeking rather to define and delimit problems and in its choice of method to balance, combine and reconcile. To read his book demands but will repay effort. He refers, briefly and aptly, to many authors, his argument is close and his style terse. Yet although terse it is clear and plain and the translator has put no stumbling-blocks in our way. Not many works of legal philosophy pack so much of value into such small bulk.

A. H. Campbell.

The Problem of Divorce. By R. S. W. Pollard. [London: C. A. Watts & Co., Ltd. 148 pp. 12s. 6d. net.]

Not very long ago, in the pages of this journal (21 M.L.R. 202), the present writer reviewed Mr. O. R. McGregor's book *Divorce in England*, in which a considerable attack was developed upon the attitude of the Royal Commission on Marriage and Divorce. Now Mr. Pollard's book provides yet a further attack, the prevailing note of which is indicated in the preface where the author refers to the relative failure of the Commission resulting from "the ingrained emotional conservatism of the majority of its members," with consequent prejudice in relation to ideas and facts. This is very reminiscent of Mr. McGregor s view. So is Mr. Pollard's criticism that the Commission failed to indicate the need for improved statistics; and so is the renewed attack upon the bias of the Commission in favour of conservative minded lawyers, and its subservience to them. Indeed in many respects the contents of this book, however unconsciously, echo the arguments of Mr. McGregor's. This is particularly true in the first chapter, in which the author deals with some of the arguments raised against the idea of divorce and the increasing of facilities for divorce. Thus Mr. Pollard also stresses that, considered in terms of the percentage of marriages, divorce is on the decrease rather than increase despite the 1937 Act and the Legal Aid scheme; he points out that the apparent increase in divorce (though relatively speaking it is not an increase) is due to the fact that marriages which previously, for economic factors, would have continued despite breakdown, are now most likely to lead to the recognition of their breakdown by divorce.

But Mr. Pollard's book deserves consideration on its own merits, rather than a bare comparison with that of Mr. McGregor, for it is written for a different public, even if its general approach to the subject is similar to *Divorce in England*. This book appears to be designed as a tract, putting forward the arguments in favour of a more liberal attitude to divorce. Since that attitude is shared by Mr. McGregor, it is only natural that the matter and arguments of these two writers should overlap; but, whereas Mr. McGregor is writing for those who would like to have statistics and gain a fairly comprehensive idea of the sociological factors involved in divorce, Mr. Pollard is writing for those who, without any detailed knowledge of either the present law or the present arguments, would like to have some guide to the attitude of those in favour of reform. Mr. McGregor's book is designed

to clarify the position and "correct" (in Mr. McGregor's view) the misapprehensions of the Morton Commission. Mr. Pollard's book is written to state a case as clearly and simply as possible in favour of reform of the law.

The contrasts between these books can be seen in two particular ways. In the first place, the contents of the books differ. Mr. McGregor is interested in analysing and discussing critically the history of divorce law, the nature of marriage, the evidence given before the Royal Commission and its Report. Mr. Pollard does deal with some of the same things, *e.g.*, the history of divorce law in England (in briefer form); but for the most part he is concerned with stating succinctly the present law of divorce, criticising it, and suggesting reforms. Amongst these may be noted the abolition of the "matrimonial offence" doctrine (with which abolition Mr. McGregor would agree) and the substitution of a general doctrine of "the breakdown of the marriage"; the introduction of divorce by consent (as in numerous European countries) and after separation for a period (as in New Zealand and Western Australia); the abandoning of separation as a ground of "relief"—which is not really relief at all; changes in the law of maintenance and children (some of which are now in the process of arriving); the broadening of the scope of magistrates' courts' jurisdiction in matrimonial cases to include divorce; and amendment of the law relating to illegitimacy. Other reforms were suggested in the evidence of the Marriage Law Reform Society to the Royal Commission: these are summarised by Mr. Pollard in Appendix I. And one may note that Mr. Pollard also suggests other reforms of more general application, such as the amalgamation of magistrates' and county courts, university degrees for all lawyers, and a Vice-Chancellor in charge of initiating law reform.

Secondly there is the question of style. Mr. McGregor's book is not only a more scholarly work (as its purpose demands): it is also written in a trenchant, often witty manner: and thus it is a more interesting work, particularly for the professional or academic lawyer. Mr. Pollard's book, being intended for the layman interested in this aspect of social and legal change, is written more simply. It is not without its harshness of comment (particularly when it deals with the attitude of religious bodies to divorce—which one can say is an easy target for writers advocating reform). But it is not a book which is likely to interest professional lawyers, save as an easy guide to the way in which some people think the law of divorce could satisfactorily be altered for the better. As such it clearly serves a useful purpose.

G. H. L. Fridman.

The Composition of Legislation. By Elmer A. Driedger, q.c., b.a., ll.b., of the Saskatchewan Bar; Assistant Deputy Minister and Parliamentary Counsel, Department of Justice, Ottawa. [Ottawa: Queen's Printer and Controller of Stationery. 1957. xxiii and 286 pp. $4.50.]

Among those who have written about legislative drafting since Bentham there are few names to set beside Thring and Ilbert, for the art of drafting statutes is learnt not from books but from experience aided by tradition. Mr. Driedger, disclaiming any intention of writing a treatise, records some of his experiences in the field of legislation, and gives an account of some of the things he does or does not do according to his own notions of what is good or right and what is not. His experience is Canadian, but most of what he says is applicable to English-speaking countries generally. Although there must be a vast store of traditional experience in the Colonial Office and other

British Government Departments, we believe that there are legislative draftsmen in various Dependencies who are in need of further advice, and to them this book will be found most useful.

Drafting comes after the formulation of legislative policy and the preparation of the legislative plan. How much time is occupied by consultation between the sponsoring Department and the draftsman is illustrated with reference to a typical short Bill. Between the date of the instructions and the receipt of the printed Bill thirty-six days elapsed. Of these, twenty-eight and a half days were spent in consideration of the Bill by the Department and consultations between the Department and the draftsman. Only four and a half days were spent in the actual preparation of drafts by the draftsman, who was dealing also with other matters, the remaining three days being occupied by the submission of the draft to the printer and the printing of the draft. The book breaks the material down conveniently into its componeat parts—principal subject and predicate, sentence modifiers, verbs, definitions, paragraphing, particular words and expressions, formalities, (*e.g.*, titles, marginal notes, preambles, publication and printing), general (*e.g.*, sections, cross-references, arrangement and punctuation), the proviso, operation, delegated legislation and so on.

We are made to realise how much can be conveyed by means of paragraphing (Chap. 7), although the draftsman should not try to convey meaning by punctuation (p. 107). Of special interest also is Chapter 11 on the proviso and its history. Legislation by reference is often attacked, but pp. 153–154 will surely convince the reader that within limits it has its justification. A section of the Canadian Veterans Benefit Act in about fifteen lines adapted the Pension Act to certain classes of war veterans. The alternative methods of reaching the same result would have involved either forty-nine pages of direct legislation or ten amending Bills. In Chapter 8 the learned author gives hints on the use of a number of words and expressions that have presumably caused difficulty to inexperienced draftsmen. With regard to the word "different," he says at p. 82 that "different *than*" and "different *to*" are in some contexts correct, but he does not indicate what these contexts are. Here we must differ *from* him until better informed.

O. HOOD PHILLIPS.

THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958. By LEARNED HAND. [Harvard University Press; London: Oxford University Press. 1958. v and 82 pp. 20s. net.]

ON this side of the Atlantic Learned Hand has for many years been one of the best known of all American judges, and the present slim volume of three lectures should serve to confirm the reputation which he already enjoys. His wisdom is profound, and his guidance to students of the law of all kinds and all ages will always be welcome. The title of the lectures is perhaps a little misleading, for this is no exhaustive account of the so-called American Bill of Rights (the first eight and the fourteenth amendments of the United States Constitution). Instead we are presented with a beautifully written account of a few thoughts on the subject. Any English reader would be advised to keep at his elbow a copy of the Constitution, including the Bill of Rights, for at no stage does the judge set out the texts upon which he is commenting, and he does tend to jump from one amendment to another throughout his argument, assuming a complete knowledge of each in his readers (or audience). He concentrates most on the first, fifth and fourteenth amendments, but the two main points in his argument may be summarised as follows. First, that the power of the courts, and particularly of the Supreme Court, to declare invalid statutes of Congress, or of the states, or acts of the President, as

being in conflict with the Bill of Rights, is nowhere to be found in the words of the Constitution or its amendments. But secondly, that nevertheless such judicial superiority over the other "Departments" must be an essential factor in the practical working of the Constitution, stemming from the long traditional function of courts to interpret statutes and documents. Such a power must, however, be carefully limited, and many instances are shown when the courts have so limited their power in this respect.

The book is produced in a style befitting its author and subject. There is no index, but a two-page Table of Cases is provided at the end. Yet it is perhaps a pity that the price should be so high, because although no one can doubt the value of the contents, some prospective purchasers are bound to be deterred on the ground that they would be getting only four pages to the shilling!

D. C. M. Yardley.

Free Elections. By W. J. M. Mackenzie, Professor of Government in the Victoria University of Manchester. [London: George Allen & Unwin, Ltd. 1958. 184 pp. 15s. net.]

We are all psephologists now: the cube law, the five per cent. swing and the party image have given savour to the insipid fare of domestic politics, and the graphs of public opinion polls are a welcome relief from league tables and weather forecasts. But although we have a good deal of material about how people vote and why they vote (or why they think they vote) as they do, together with some rather indigestible studies of systems of electoral representation, too little attention has been given to the broader issues involved in the organisation and conduct of elections. During the last few years Britain has introduced, or approved the introduction, of direct elections in a number of dependent territories, and in the process a multitude of problems has arisen. Professor Mackenzie had to grapple with some of these problems in his constitutional investigations in Tanganyika, and one may assume that his new book is in large measure the result of his reflections in that context. He calls it "an elementary textbook," and it appears as one of the Minerva Series of students' handbooks. It is an elementary textbook in so far as it provides a concise and comprehensive survey of all the main issues from fancy franchises and proportional representation to the marking of ballot-papers and the control of party political broadcasts. But it is also an outstandingly able piece of writing, drawing upon a wealth of comparative material presented with critical discernment and in a pleasing style. No teacher of politics or public law can afford not to have this book. Fortunately, it is published at a price which should ensure that it will attract a wide circle of readers.

S. A. de Smith.

International Institutions. By Paul Reuter. Translated from the French by J. M. Chapman. [London: George Allen & Unwin, Ltd. 1958. 316 pp. 28s. net.]

It may be as well to begin this review by warning readers that this book is not, as might be expected from the title, a study of international institutions in the sense of international organisations, although it is partly that. Few people would, of course, be more qualified to undertake a comprehensive study of international organisations than Professor Reuter, the author of the leading work on the European Coal and Steel Community. But in this book Professor Reuter has interpreted the word "institutions," as he is perfectly entitled to do, in the wider sense of "the organisations, the traditions and the

basic rules of a particular society," in this case international society. Accordingly, the book begins with an introductory study, primarily sociological in character, of the nature of international society. Part One is devoted mainly to a study of the historical evolution of international relations and international institutions (in the wide sense) up to the present day, but includes as well a section on general notions of contemporary international law. Part Two consists of a study of States, the principal subjects of international law, and also of the manner in which States conduct their mutual relations. Only in Part Three, forming about one third of the book, does the author deal with international organisations as such.

The first question to be considered is whether Professor Reuter has not attempted to do too much in a mere three hundred pages. It is true that Brierly's classic work, *The Law of Nations,* with which this book may in some ways be compared, is of roughly the same length; but Professor Reuter has attempted to cover considerably more ground than did Brierly. The result is a tantalising work, not entirely satisfying in itself, but cast in such a form as to make one wish one could see a more developed version. It makes one feel that Professor Reuter must be a very stimulating lecturer, but one would like to see more than his notes.

For example, Professor Reuter makes some pungent remarks on the doctrine of international law. He distinguishes between empirical writers, among whom he classifies most Anglo-Saxon jurists and some French, and systematic writers. The former, he says, proceed mainly from the particular rule to the general principle. The latter he divides into those who deny the existence of international law; those who seek to subordinate law to another discipline, such as ethics or sociology; and finally those (mostly German and Italian) who have reacted vigorously against treating the study of international law in terms of ethics, sociology, diplomacy or any of the other moral or social sciences and seek merely to make all juridical rules fit into a coherent whole, deriving all these rules from one fundamental rule. Professor Reuter then tells us that, for his part, "no legal theory, however elegant and beautiful in itself, is of any value divorced from social and human realities, for these are its justification" (p. 67). Altogether this pragmatic approach is admirable, and Professor Reuter is no less to be commended for devoting more attention than do most international lawyers to the problem of assistance to underdeveloped countries, which he describes as "the central problem of present-day international society" (p. 74). But it will scarcely do to tell us after two pages on custom and two pages on the general principles of law that "the distinction between customary rules and general principles of law is only of secondary practical importance in the present state of international relations" (p. 135), even if this statement contains, as it probably does, a good deal of truth.

Some of Professor Reuter's generalisations are provocative, but scarcely acceptable without qualification. One may agree with him, for instance, when he says that "the absolute nature of State sovereignty must decline in the long run with the growth of the international protection of human rights" (p. 91). But the history of attempts to draft covenants for the protection of human rights scarcely justifies the statement that "States which lay down the necessary rules and institutions think more about the limitations this protection will impose on the sovereignty of neighbouring States than on the limitations that will be imposed on them" (*ibid.*). If this were really so, it would surely not be so difficult to agree on these covenants. Nor does the practice of the United Nations in regard to the domestic jurisdiction clause of the Charter entirely bear out the statement that the tendency in interpreting the constitutions of international organisations is "to accept the interpretation which trespasses least on State sovereignty, and this is sure to be given by assemblies composed of government delegates" (p. 236).

As compared with many books of this size, however, and even with much

larger works, this book is to be commended for the attention given by the author to a number of matters too often neglected by legal writers. Among these matters may be mentioned the difficulties of federal States in conducting certain aspects of their international relations; the administrative and financial problems of international organisations; and technical assistance to under-developed countries.

D. H. N. Johnson.

The Occupation of Enemy Territory. A Commentary on the Law and Practice of Belligerent Occupation. By Gerhard von Glahn. [Minneapolis: University of Minnesota Press. London: Oxford University Press. xiii and 350 pp. £2 12s. net.]

The sub-title of this work is a misnomer. The author, who is Professor of political science at the University of Minnesota, has not written a commentary on either the rules of the Hague Regulations of 1907 or those of the Geneva Convention of 1949 relating to his topic. His book is a textbook and it is not written exclusively or even predominantly for, or from the viewpoint of, legal readers but from that of an administrator for whom legal questions are no doubt of great importance but necessarily not the alpha and omega of what he has to know and consider. This does not mean that his work does not deserve close attention from those who view the field primarily as lawyers. On the contrary: the author's approach shows only too clearly that crucial parts of his topic are not covered by any legal rules or—worse still—by rules which are vague or ambiguous or the subject-matter of a great deal of dispute.

After a brief sketch of the more recent developments of international law on belligerent occupation the author deals with every major practical aspect of the law and practice of military occupation from its inception until its termination and the return of the former lawful sovereign. His manner of treatment is throughout characterised by lucidity, moderation, common sense and fairness to all the multifarious interests involved. Merely theoretical problems are dealt with only briefly. A wealth of illustrations from the two world wars, consisting not merely of references to decided cases but also of statements on other points of practical experience render the book uncommonly interesting reading.

The author, who was a member of the staff of OMGUS, the office of the American Military Government of Germany, has been able in part to rely on unpublished information, in particular on points of American Military Government practice after the Second World War. He has, however, not neglected the vast literature which has been accumulated. He has commented critically and soundly on numerous debated points. One cannot possibly blame him for occasional gaps in his extensive bibliography but it is regrettable that he seems to have completed his manuscript just about the time when Bathurst and Simpson's monograph on the post-war development of the occupation régime in Germany was published. This work has therefore not been taken into account by him.

There is as yet no other comprehensive treatise on the law of occupation of enemy territory since the end of the Second World War. Lawyers will naturally wish for the publication of a more specifically legal work, in particular for a commentary on the new Geneva Convention of 1949 which was ratified by this country in 1957. But the present work has undoubtedly facilitated the task of writing a comprehensive legal treatise and will for some time to come retain its value as a stimulating introduction to a branch of law in which there are as yet all too many disputed problems of considerable practical importance.

E. J. Cohn.

THE SALE OF GOODS. By P. S. ATIYAH, B.A., B.C.L. [London: Sir Isaac Pitman & Sons, Ltd. 1957. xxv and 206 pp. 25s. net.]

As Professor Gower says in his foreword to this work, teachers of Commercial Law have long felt the need for an up-to-date narrative textbook on Sale of Goods and the want is now more than well supplied.

Commentaries on the text of the Act may, as Professor Gower also points out, have been convenient for practitioners and it can perhaps be argued in their defence that for teaching purposes they had the merit of keying knowledge of the subject closely to the *ipsissima verba* of the statute. However, Mr. Atiyah makes the point that an arrangement of subject-matter suitable for a statute is not necessarily appropriate for a textbook. He has therefore adopted a new scheme which is one of the most outstanding of the many excellent features of the book. Furthermore the older commentaries tended to be somewhat uncritical in their approach to the Act, indeed, by the standards of this book, grossly complacent. The last charge that can be brought against this work is pedestrianism. The author remarks that, despite the praise that has been lavished on it, the Sale of Goods Act was perhaps the least successful of Sir Mackenzie Chalmers' works of draftsmanship and has spared no pains to support his assertion by examples of difficult problems of interpretation arising on the text of the Act. It may perhaps be that in some of these demonstrations he has been carried away by the exuberance of his own critical acumen, as at p. 67 in the example of the umbrella which is fit for its purpose at the time of sale but shortly afterwards ceases to be so. The tone of the book is one of close-knit and intricate reasoning, excellent for the good student, but perhaps daunting to one less well equipped. It is certainly not a book for beginners.

The emphasis is placed on legal logic rather than on commercial practice, as can be seen, for instance, in the rather meagre treatment given to export contracts and bankers' commercial credits. Furthermore a strict interpretation is given to the scope of Sale of Goods as a subject and the only substantial excursion into general principles of contract law is a short but valuable chapter on mistake. In later editions the statement on p. 22, n. 7, that the purchaser of a *res sua* cannot sue his seller on the implied terms will doubtless be amended to accord with the author's later view in 73 L.Q.R. at p. 344, that an action would lie for breach of section 12 (1).

In selecting cases, the guiding principle in *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107 has been observed and the express adoption of this rule of selection and its excellent effect in tautening and clarifying the exposition of general principles must be accounted another of the great merits of this book.

In the case of a book which challenges accepted positions at so many points it is hardly possible to do more than give a selection of points of comment, though for the sake of students the author might perhaps have repeated more frequently the fair warning given at p. 100 that some of his views are not "exactly orthodox."

Though the view is taken that the effect of the definition of "goods" in section 62 has been to abolish the old distinction between *fructus industriales* and *fructus naturales* some warning might have been given that this is a minority opinion. The more generally accepted view seems to be that growing crops can in some circumstances be both goods and land.

In discussing the question of an infant's liability for necessary goods at pp. 31–32, some reference might have been made to the view taken in Salmond and Williams on *Contract*, 2nd ed., pp. 306–309, that this liability is contractual with the corollary that the infant is liable on an executory contract for necessaries. Since the breadth of the protection given to infants in the

law of contract has been subjected to so much modern criticism any suggestion for narrowing it seems deserving of notice.

At p. 78 it is suggested that the effect of the opening words of section 14 "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—" is to exclude completely the implication of any term as to the quality of goods sold which does not fall within the terms of the sections of the Act even though the court may strongly feel that it is very desirable that such a term should be implied and that this might be very unfortunate in the cases of sales where the seller is not a trader.

Might it be suggested that the express reference to the provisions of the Act coupled with the preservation of the common law by section 61 (2) could allow the court to imply a term, even in such a case, if *The Moorcock* (1889) 14 P.D. 64 conditions as to business efficacy were satisfied? The prohibition in the opening words of section 14 might then be read as merely a statutory re-statement of the common law prohibitions on implication, as where the term is merely reasonable but not necessary.

The suggestion in the footnote to p. 79 that the *Grant* v. *Australian Knitting Mills* [1936] A.C. 85 view of reliance on the seller's skill and judgment cannot be extended to the case where the buyer selects goods for himself because this would reduce the proviso to section 14 (1) to uselessness seems open to two objections. First, the proviso only applies when goods are bought under a trade name and self-selected goods are not necessarily bought under a trade name. Secondly, the interpretation placed on this proviso in *Baldry* v. *Marshall* [1925] 1 K.B. 260 has in effect already reduced it to uselessness for, as explained by Bankes L.J. at pp. 266–267, it is only to operate when the buyer places no reliance on the skill and judgment of the seller by expressly requesting goods under a trade name—a case which would seem in any case not to fall within the main provisions of the subsection and to require no proviso.

In discussing implied terms some allusion might have been made to the many other statutory provisions which operate to imply terms in contracts of sale as, for example, the Merchandise Marks Acts, 1887 and 1953, and other more specialised Acts.

The answer to the query in footnote 6 on p. 22 to the effect that Hallett J. did not explain how he was able to give damages for breach of warranty in *Nicholson Venn* v. *Smith Marriott* (1947) 177 L.T. 189, when the contract was, in his view, void for mistake seems to lie in the concluding paragraph of the report where he said that he was exonerated from having to give a final opinion on the mistake question because counsel for the plaintiffs was content to accept judgment on the breach of condition point alone. This seems to be a reasonable application of the general rule, adverted to in the last paragraph of p. 25, that the court is not bound to notice and give effect to mistake and frustration unless the points are raised by the parties. Perhaps some mention might have been made of the point made by Mr. Melville in his article "The Core of a Contract" (1956) 19 M.L.R. 26 at p. 36, that the development of the doctrine of the fundamental term may bolster the now somewhat shaky authority of this case. Incidentally the text of footnote 6 appears to belong more properly to footnote 5.

Quaint as it is, it may perhaps be doubted whether the doctrine of market overt deserves all the severity of the strictures bestowed upon it in this book. Any relaxation of *nemo dat* which protects the bona fide purchaser seems to that extent to be a good thing. Would not rationalising reforms on the lines suggested by Dr. Ivamy in 9 *Current Legal Problems* 131 be better than total abolition?

In discussing the problem whether the condition implied by section 12 (1) can be excluded and, if it can, the nature of the ensuing contract, reference

might perhaps have been made to *Payne* v. *Elsden* (1900) 17 T.L.R. 161, where Ridley J. appeared to be unperturbed by the exclusion of the subsection and untroubled by any suspicion that this raised any difficult question of construction. Apart from this the treatment of sections 11 and 12 and the cases upon them, especially *Rowland* v. *Divall* [1923] 2 K.B. 500, is most illuminating and stimulating.

The problem raised in footnote 4, p. 18, could perhaps have been carried a little further by a mention of the co-ownership suggestion in *Inglis* v. *Stock* (1885) 10 App.Cas. 263, doubted by Benjamin at p. 341.

The statement on p. 159 that transit ends when the goods are delivered to a ship chartered to the buyer on a time charterparty seems misleading. It would seem that this is so only in the case of a charterparty by demise. In the case of an ordinary time charterparty where the shipowner remains in control of the ship it seems accepted that this result will not follow unless some further element in the facts makes it clear that the parties intend the transit to end: Benjamin, p. 893.

The first footnote on p. 176 does not appear to give a very satisfactory account of the rule that seems to have been laid down by Lewis J. in *Jewelowski* v. *Propp* [1944] K.B. 510. The proposition that a person injured by breach of contract is not bound to spend money in mitigation when to do so would amount to a risky and speculative venture seems merely to be a special application of the general rule that only reasonable steps need be taken in mitigation. Lewis J. made no express reference to any element of risk attending the expenditure of the money in *Jewelowski* and appeared to found his decision on the element of fraud in that case, apparently laying down a rule that in the case of deceit there is never any duty to mitigate by spending money and if the plaintiff does in fact succeed in reducing the harmful effects of fraud by such expenditure the defendant, by exception to the general rule that "voluntary" mitigation will be taken into account, cannot claim that this mitigation in fact should go in reduction of the damages payable by him. Additionally or alternatively this case could be regarded as having been so severely handled by Dr. Glanville Williams' *Joint Torts and Contributory Negligence*, pp. 284–285, as to be unfit to be mentioned to students without a serious caution.

There are one or two very minor misprints—"if" for "it" in line 19 of page 38, "queare" for "quaere," page 18, n. 4, "Blachistone" for "Blackstone," page 136, n. 5, "Kurle" for "Curle" in *Laing* v. *Barclay, Curle*, but the general standard of production is excellent.

In conclusion, it must be said that any criticism of this book must be a very trifling thing in comparison with the standard of its achievement. It is certain to long remain a landmark in the literature of commercial law.

A. H. HUDSON.

ANTI-TRUST IN PERSPECTIVE. THE COMPLEMENTARY ROLES OF RULE AND DISCRETION. By MILTON HANDLER, Professor of Law, Columbia University. [New York: Columbia University Press. 1957. Distributed in U.K. by Oxford University Press. vii and 151 pp. 24s. net.]

THE American anti-trust law has long ceased to be of interest to American lawyers only. Its external effects have influenced the economies of all countries on this side of the iron curtain. Its leading ideas have been "received" into more legal systems than those of any other modern national statute. Professor Milton Handler possesses the qualifications necessary to allow his readers to look at the bewildering complexities of his field in perspective: in addition to his high qualifications as an academic lawyer he

has gained a vast practical experience in this branch of law as a member of a large firm of New York attorneys.

In the first of his three chapters he shows that the American anti-trust law was not a mere creation of modern legislation. The Sherman Act merely confirmed rules of judge-made law. After the Sherman Act had been enacted it became the task of the judiciary to fill the many gaps left by the legislature. From among the numerous judicial workmen who tilled the field the learned author chooses Justices Peckham, White, Taft, Holmes, Brandeis and Stone in order to demonstrate how their personal views, experiences and even prejudices played their part in the tortuous development of the interpretation of the Act. The final victor in the struggle was White, whose "rule of reason" became firmly entrenched as the basic principle of anti-trust law as laid down in the Sherman Act. In his second chapter the learned author deals with the conception of "exclusive dealing" which was forbidden by the Clayton Act. This Act constituted a reaction to the softening-up process which the anti-trust law had undergone at the hand of the "rule of reason." It is, therefore, perhaps not very surprising that the Federal Supreme Court interpreting the conception of "exclusive dealing" in section 3 of the Act in the leading judgment in the case of the Standard Stations adopted a method which is obviously incompatible with the flexibility demanded by the "rule of reason." In the court's view legality of exclusive dealing agreements depends solely upon whether it can be proved "that competition has been foreclosed in a substantial share of the line of commerce affected." In one case the court has gone to the extent of holding that 2 per cent. worth of the relevant market may suffice to constitute a substantial share.

Professor Handler is highly critical of this line of thought. He wishes to see the criterion of mere quantitive substantiality replaced by a "régime of enlightened discretion" to be exercised by the judiciary under the aspect of the ultimate purposes of the anti-trust legislation, *i.e.*, the maintenance of competition. He presents similar arguments in his third chapter in regard to the interpretation of section 7 of the Clayton Act which prohibits mergers whose effect may be substantially to lessen competition or to tend to create a monopoly. He deplores the use of "facile mechanical rules" and claims that "the true objectives of anti-trust can only be furthered by considering the challenged acquisition in the light of . . . a comprehensive analysis calculated to produce a determination based on an awareness of all relevant market data."

The learned author supports his thesis with the eloquence of an experienced and eminent teacher and pleader, but one of his readers in any event has not been convinced. His assertion that "certainty is as undesirable as it is unattainable" runs counter to the experience of mankind in all other fields of law. A purely economic investigation, such as he requires the courts to undertake, is wholly outside the province of judicial work. It places, in fact, the judge at the mercy of the persuasiveness of opposing expert witnesses—and this in a field in which even the most eminent experts can venture to predict only with trepidation and at the grave risk of being very soon shown wrong. The mechanical rules which the judges prefer will equally be preferred by those called upon to draft agreements: they in any case will never be able to undertake an analysis of the type on the results of which Professor Handler wishes the question of legality to depend. Whether one agrees with the learned author or not, his stimulating addresses will undoubtedly assist those to whom anti-trust law has not yet become a matter of daily routine in the task of understanding the type of problems with which the specialists in this field are concerned. They can be warmly recommended to readers in this country who by dint of necessity have to familiarise themselves with the basic problems of this important field of law.

E. J. Cohn.

PERSONAL PROPERTY. Second edition. By J. CROSSLEY VAINES, LL.M. [London: Butterworth & Co. (Publishers), Ltd. 1957. lv and 370 and (Appendix) 61 and (Index) 23 pp. 47s. 6d. net.]

THE first edition of this book was severely handled by the reviewers; see, for example, p. 532 of Vol. 18 of this Review, 71 L.Q.R. 150, and 1954 *Cambridge Law Journal* 252. To be sure, a contributor to the *Law Times* (Vol. 218, p. 79) used these words, "This is a first-class textbook. The author has learning, is thorough, accurate and painstaking," but his was a voice crying alone.

Before considering to what extent these criticisms have been taken to heart in preparing this edition, it is as well to point out that the reviewers of the first edition were unanimous in saying that there is a demand for a book on personal property, that the author has set out to meet that demand, that he has included all the useful topics and wisely omitted those better left to the monographs. Two substantial criticisms were offered; that the style was not sufficiently lucid and the subject-matter not so well drawn together as a book for students requires, and secondly that slips and errors were legion.

To some extent the first criticism has been met. The order of certain topics has been tidied up. A summary of the remedies of trespass, conversion and detinue is now given. The meaning of the sentence, "The assignment is subject to existing equities" has been amplified (p. 211). In fact there are seventy-eight more pages of text (and the price has gone up by ten shillings!) which suggests that some expansion of statements of principle has been made. But there is still the occasional blemish; on p. 306 the account of the facts of *Merry* v. *Green* only makes sense if in line 5 one reads "plaintiff" for "defendant." In the chapter on Sale of Goods, in the paragraph entitled "Implied conditions and warranties," on p. 277, there is an attempt to set out the entire learning on conditions, warranties and "mere" representations; the author unhappily falls between two stools, for the treatment is incomplete—there is no mention there of the "fundamental term"—and yet is so full of detail as to cause mental indigestion. And is it really helpful to the student to say (on p. 277) that an innocent misrepresentation may be a ground for rescission (and by whom? the court, or the party injured?) before acceptance, "or possibly (*in circumstances which remain obscure*) even after the contract has been executed"?

There is a long chapter on negotiable instruments (pp. 163–205). Negotiability is defined, but it is not contrasted with transferability alone. This is important, because the author says on p. 164 that a cheque is a species of negotiable instrument, and any intelligent law student knows that a cheque may be crossed "Not negotiable." In truth the time has come when those concerned with legal education must decide how much law students should know about bills of exchange; the experience of this reviewer is that students think of the subject as archaic lumber save for the application to cheques. Could not agreement be reached among examiners and teachers of law that the student should be expected to know only so much of the law of negotiable instruments as relates to the cheque?

This edition is a substantial improvement on the first edition; it contains, as its predecessor did, a wealth of authority, and perhaps it is no bad thing that the student should be driven back to the authorities, and made to puzzle them out for himself.

ALLISTER LONSDALE.

THE LAW OF TORT: A TREATISE ON THE LAW OF CIVIL WRONGS. Fifth edition. By S. RAMASWAMY IYER, B.A., B.L., Senior Advocate of the Supreme Court of India. [Calcutta: Eastern Law House Private, Ltd. 754 pp. (with index).]

A book which has now reached its fifth edition and has been favourably received on the previous occasions on which it has appeared is a difficult task for a reviewer, in that whatever is excellent about the book has probably already been praised, and whatever bad features may have been present have probably disappeared as a result of criticisms, or have become unimportant with the passing of the years. Moreover, the "public" must by now be fully aware of the advantages and disadvantages of such a book. Hence there is little need for the kind of lengthy and detailed review which a completely new book on any subject properly deserves.

However, two aspects of the book should be discussed. The first is the method adopted by the author for the presentation of the material. This involves three points, style, plan of exposition, and the standard of the contents. The style is clear and straightforward. What the author is seeking to do is to state and expound the law rather than discuss it. For example, the author says about the Law Reform (Contributory Negligence) Act, 1945, that the decision in *Stapley* v. *Gypsum Mines, Ltd.*, "shows that even after the Act the question of causation is still important in cases of contributory negligence" (p. 545). There is no reference to the debate that has later taken place in England on this subject. In general it is fair to say that there is not as much reference to periodical literature and the opinions of writers about tort as can be found in the standard English books.

The author's plan of exposition is indeed "unusual" as was said of it in the previous review in this Journal (15 M.L.R. 110). But it is perhaps no longer quite as unusual as it was in 1952: for more and more writers on torts are realising that the old approach of Salmond is strained and artificial, and are presenting the law of torts in the form of a discussion of individual torts first and general principles afterwards. However, the author of this book still has at least two novelties. The first is his division of the presentation of negligence into two chapters, one on "general principles," the other on "particular cases." The chapter on general principles is an admirably succinct account of the way in which the concept of negligence has emerged in the last 150 years: pointing out the peculiarities of the law of negligence, such as the "artificial" separation of the issue of liability for negligence into three separate issues, duty, breach, and causal relation. At the end of the chapter Mr. Iyer suggests (with what justification the reader must decide for himself), that there is "a definite sway towards elimination of the peculiarities . . . and rationalisation of the law" (p. 429). In the succeeding chapter he deals with particular instances of negligence. This includes such obvious cases as occupiers' liability and the relation of master and servant: but it also includes, a little strangely to English eyes, liability for animals, both wild and tame, and carrier's liability. The second (and welcome) novelty, is a separate chapter on "Causation" which contains much useful analysis and discussion. So far as the rest of the book is concerned, the method of exposition is similar to other books on torts, with separate chapters on injuries to the person, wrongs to immovable property, wrongs to movable property, injuries to domestic relations, conspiracy, nuisance, etc. Mr. Iyer does not seem to make the more modern distinctions of Professor Street, between injuries to various kinds of "interests." Instead he follows the more familiar pattern of Salmond and Winfield.

The standard of the contents is high. There is copious reference to authority, both English and Indian. There is some reference to American and Commonwealth cases, but less than is becoming fashionable at least in England, where writers have for too long neglected the results of litigation

in the courts of Canada, Australia and New Zealand. The subject-matter is divided up in such a way as to make the treatment of each topic abundantly clear and easy to follow. Possibly the main criticism to be made is that the facts of not enough of the cases are set out in the text itself. Instead the reader is left to take the report from the shelves and digest the case himself.

All this leads to the second main topic for discussion in this review, namely, for whom is the book suitable? In the earlier review, already mentioned, it was said that this book was useful, if read with discrimination, for law teachers and practitioners, but hardly to be recommended with safety for any but the brightest student. The present reviewer is inclined to agree with this judgment. It is a book which cannot fail to interest and instruct someone with a good knowledge of the subject, for it suggests new methods of approach and analysis. But, as a textbook for beginners in the law of torts in this country, it suffers from the demerits which have been pointed out above, namely, lack of adequate discussion of doubtful points, lack of reference to literature, lack of sufficient statement of the facts of cases. In some ways this book may be the equal of some of the leading English textbooks on torts, but it is hardly better than those books. Perhaps one can say of it that for the English lawyer it is useful, but not indispensable.

G. H. L. FRIDMAN.

THE PROOF OF GUILT. A Study of the English Criminal Trial. By GLANVILLE WILLIAMS. (The Hamlyn Lectures, Seventh Series). Second Edition. [London: Stevens & Sons, Ltd. 1958. ix and 326 pp. 20s. net.]

DR. GLANVILLE WILLIAMS' important series of Hamlyn Lectures delivered in 1955 on "The Proof of Guilt" was reviewed in the M.L.R. two years ago. The welcome demand for a second edition has enabled the author not only to revise his text in the light of developments in the past two years, but to make additions of considerable significance (amounting altogether to some 32 pages) which further justify the claim of this work to be considered the most stimulating study of the English criminal trial that has appeared for many years. In particular, the author has expanded and strengthened his chapter on "Mistaken Evidence" which is at the very heart of the matter if it is true, as I believe, that the real danger of miscarriage of justice lies in involuntary errors in testimony rather than in the lying witness, and that the safeguards evolved by English law against the latter are by no means adequate to cope with the former. At the end of the chapter dealing with the trial of several charges at one time and the trial together of different defendants a new paragraph has been unobtrusively slipped in suggesting that, if need be, one judge might be put in charge of several juries sitting in the same court at the same time, each trying a different defendant. This must be dynamite to the multitude (of lawyers), but it shows that Dr. Glanville Williams is never afraid of advancing even the most unorthodox solutions if he sees a real need for them.

Unfortunately the publishers have not yet seen fit to have an index prepared for what is now undoubtedly a book to be put on the reference shelf.

H. A. HAMMELMANN.

Books and Publications Received

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. VII, No. 1, 1958. Abstracts of articles published from October to December, 1957. Basil Blackwell, Oxford.

Arkiv for Sjørett, Bind 3–Hefte 3, Mars 1958.

A. I. R. COMMENTARIES. THE CODE OF CIVIL PROCEDURE (V of 1908). Sixth (1957) Edition. Vol. II, Sections 102–158. Vol. III, First Schedule, Orders XXI to XL. The All India Reporter Ltd., Nagpur.

UNDERHILL'S LAW RELATING TO TRUSTS AND TRUSTEES, Tenth Edition. Seventh Cumulative Supplement, up to September 1, 1957. By M. M. WELLS, M.A. Butterworth & Co., Publishers, Ltd. 8s. 6d. Postage 6d. Combined price 77s. 6d. Postage 2s.

CURRENT LAW YEAR BOOK, 1957, with Cumulative Index to All The Law for 1947–1957. CURRENT LAW CITATOR, 1947–1957. Sweet & Maxwell, Ltd. Year Book and Citator, 1957. Two Volumes, £4 10s. net.

ADULT EDUCATION. By ROBERT PEERS. International Library of Sociology and Social Reconstruction. Routledge & Kegan Paul, Ltd. 1958. xiv and 365 pp. 35s. net.

THE LAWYER'S COMPANION AND DIARY, 1959. Editors: W. H. REDMAN and LESLIE C. E. TURNER. Stevens & Sons, Ltd. 2,159 pp. Day to a page 30s.; Week at an opening 25s.

Third (Cumulative) Supplement to DYMOND'S DEATH DUTIES, Twelfth edition. By ROBERT DYMOND and REGINALD K. JOHNS. The Solicitors' Law Stationery Society, Ltd. 1958. xx and 182 pp. 21s. net.

CHARLESWORTH ON NEGLIGENCE. Second Cumulative Supplement to the third edition. (To September 1, 1958.) By R. A. PERCY. Sweet & Maxwell, Ltd. 1958. 7s. 6d. post free.

CLERK AND LINDSELL ON TORTS. Fourth Cumulative Supplement to the eleventh edition. (To September 1, 1958.) By F. MAURICE DRAKE. Sweet & Maxwell, Ltd. 1958. 7s. 6d. post paid.

CHITTY ON CONTRACTS. Vol. 1. Fourth Cumulative Supplement to the twenty-first edition. (To September 1, 1958.)

Vol. 2. Fourth Cumulative Supplement to the twenty-first edition. (To September 1, 1958.) By F. MAURICE DRAKE. Sweet & Maxwell, Ltd. 1958. Supplements to Vols. 1 and 2 together. 7s. 6d. post free.

A TREATISE ON THE LAW OF EXECUTION PROCEEDINGS. By R. K. SOONAVALA. Bombay: N. M. Tripathi Private, Ltd., Princess Street. 1958. Agents in U.K. Sweet & Maxwell, Ltd. xliv and 1,450 pp. £4 10s. net.